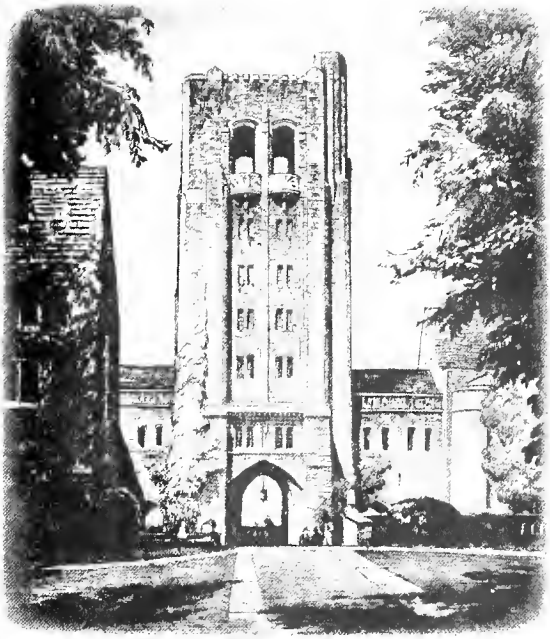

ON THE

NATURE AND EVIDENCE

OF

TITLE TO REALTY.

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ON THE

NATURE AND EVIDENCE

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TITLE TO REALTY

A HISTORICAL SKETCH,

BEING THE YORKE PRIZE ESSAY (1898),
UNIVERSITY OF CAMBRIDGE.

BY

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an accurate history of title for the last thirteen centuries. This essay makes no pretensions to satisfy the requirements of such a history, being at best but a rough sketch as a first approximation to the truth. The essay was written in 1898 for the Yorke Prize in the University of Cambridge, and, fearing that no good thing could come out of a prize essay, the author had intended to recast the whole before publication. However, before anything could be done, he had to undertake the duties of a professor in New Zealand, and whatever the advantages of living in a land that is "loneliest, loveliest, exquisite, apart" it cannot be said that facility for writing the history of English law is one of them. In fact, after much delay, the idea of reconstruction has been abandoned for the present, and the essay is published in its original form.

The value of some historical knowledge to the ordinary legal practitioner is more widely recognised to-day than formerly, and the change is reflected in modern text-books of the better class. However it is not solely for its bearing on actual practice that a conveyancer should know something of the history of title. Perhaps a better reason for the study is that the knowledge so acquired will give a human interest to an otherwise dull and lifeless profession. The law on the subject of title is a purely human structure whose foundations were laid centuries ago, and in its different parts we can see traces of the ideas and ways of life of the men of all the intervening ages. We begin with a number of semi-barbarous tribes whose needs are few and laws correspondingly simple, and watch a slow development until we see before us the highly complex system that suits the requirements of the modern man. In the meanwhile the greatest currents in the race are indicated by the changing language of the courts, and the record of actual cases gives us an insight into daily

life that could hardly otherwise be obtained. On all sides we are met by struggle, the seal of life and means of progress. We see struggles with kings and barons over villeinage, escheats, wills, and uses; with grasping lords over rights of common; with covetous ecclesiastics over gifts in mortmain; and witness throughout the whole stretch of history the great battle against forms that have outlived their day. We see institutions slowly yielding to the pressure of public opinion, and mark the various means that are adopted to keep the law in pace with the times. Judicial decisions make gradual changes, and at times even go the length of nullifying Acts of Parliament, as happened with the law of trusts and estates tail. Fictions, too, are freely employed with the same end, and these we find in their most extravagant form within the field of realty in Fines and Recoveries. Such indirect ways of modifying the law are supplemented from time to time by direct legislation, a method that grows in favour, and, in the end, overshadows all the rest. We see, too, that these methods of keeping in touch with the spirit of the times are not without their defects. The judges' alterations are of a patchwork character; and, where fictions are prominent, the most cumbrous and expensive forms are used to effect what might be done quite simply. Walton, in his *Compleat Angler* [1653], speaks with regret of the simple days "when there were fewer lawyers; when men might have had a lordship safely conveyed to them in a piece of parchment no bigger than your hand, though several sheets will not do it safely in this wiser age." He would have had still more reason for regrets if he had lived a century later, when many conveyances were attended with such "mystic rites and solemnities that not even the ministering officers could comprehend them." Nor is the work of the legislature always a much greater success. When a portion of the building of law has ceased to be of use, we

cannot usually afford to leave it standing as a picturesque example of an obsolete style of architecture. It may be interesting historically, but it will be practically a nuisance. In such circumstances the instinct of the practical man is to knock the structure down, but in doing this he is apt to overturn more than he intended, and to weaken the foundations of much that is left standing. Thus the task of restoring an ancient building requires knowledge and skill, and so the work of carrying out reforms in the law can be safely conducted only under the guidance of those who understand thoroughly the complex structure that is undergoing repair.

My thanks are due to the Wellington Law Society for its courtesy in allowing me to use its library and so to verify some of the references.

R. C. M.

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CHAPTER I.

INTRODUCTORY.

THE advantages of studying the history of a subject need not be set out to-day when the triumphs of the historical method are among the commonplaces of the schools. We have all learnt in a measure that "the roots of the present lie deep in the past." Law grows with society, and if we would understand its later development we must know something of its youth. With this truth before us we cannot fail to find a living interest in much that would otherwise appear dead, and even the formalities of law are clothed with new meaning. Advantages of historical treatment.

In many pursuits the most serious obstacles are met with at the outset, and this is specially true in the study of legal history. The materials are usually most scanty where the natural difficulties are greatest, and although simplicity may be reached in the end, at the beginning we can expect only the indefinite. The one safe method seems to be to work backwards from the known to the unknown, and from a careful study of historic times to get a clue to what has gone before. For institutions do not often pass away without leaving some fossil remains that may serve to restore a bygone age. Still even with this help the task of reconstruction is far from easy, and although we may get some further guidance from a survey of primitive societies that still exist we cannot always rely on this, for we have no right to assume that the order of progress has been everywhere the same.

Our object in the present essay is to consider the various modes of acquiring real property that have obtained throughout English history. Men have not always had private property in land, and the first question to discuss is—when did our forefathers begin this practice and what were their methods of acquiring such property? The problem of the origin of property has been discussed for ages. The Roman jurists had much to say about the 'natural' modes of acquisition, chief among which was Occupancy, "the advisedly taking possession of what at the moment is the property of nobody, with the view of acquiring property in it for oneself." In this process was seen the first step towards private ownership, and the theory was accepted with satisfaction by successive jurists and popularised in England by Blackstone. "The earth and all things therein were the general property of mankind from the immediate gift of the Creator.....By the law of nature and reason he who first began to use it acquired therein a kind of transient property that lasted so long as he was using it and no longer....Thus the ground was in common and no part was the permanent property of any man in particular; yet whoever was in the occupation of any determined spot of it, for rest, for shade, or the like, acquired a sort of ownership from which it would have been unjust and contrary to the law of nature to have driven him by force, but the instant that he quitted the use or occupation of it another might seize it without injustice....When mankind increased in number it became necessary to entertain conceptions of more permanent dominion and to appropriate to individuals not the immediate use only, but the very substance of the thing to be used[1]."

Origin of Property.

Blackstone's account.

There is, no doubt, an element of truth in what Blackstone says, but very little examination will show that his statement is a poor explanation of the origin of private property. Blackstone pictures us a man in

Its insufficiency.

[1] Blackstone, *Comm.* II. 3.

the early stages of society acquiring a sort of ownership "from which it would have been unjust and contrary to the laws of nature to have driven him by force." We are not acquainted with any "law of nature[1]" that has a bearing on the matter; and as to its 'injustice' we might be agreed to-day, but the natural man in the earliest ages may not have had so much respect for what we call justice. In fact the whole theory clearly presupposes a somewhat advanced conception of justice and morality on the part of the community, and although it may explain the function of 'occupancy' at a later period of history it can help us little at the beginning.

We shall examine the light that history throws on the subject a little later; but since the historical accounts leave much to be desired it may be well to see what help can be got from a study of existing primitive races. For this purpose we may arrange these races under a number of types. The lowest—represented by the Bushmen of South Africa, or some of the inhabitants of central Borneo—consists of a primitive horde of wandering hunters, with neither houses nor cattle. They have not even regular hunting grounds (being in this matter less advanced than many animals); they own only what they actually hold.

Property among primitive races.

A slightly higher type is met with in Australia and other places where a clan system prevails. The members of the clan are, or are supposed to be, akin. They have advanced from the lowest type in so far as they have a well defined hunting ground; but this belongs to the clan and not to the individual. However, already we see the elements of private property, though not in land. A few things are appropriated to individuals, the most

Clans.

[1] The phrase is a very ancient one and covers a multitude of obscurities. Doubtless Blackstone here uses it for the precept of reason to refrain from molesting others with a view to self-preservation. Hobbes (*Leviathan*, I. c. 15) enumerates nineteen 'laws of nature' and adds "These have been contracted into one easie sum intelligible even to the meanest capacity, Do not that to another which thou wouldest not have done to thy selfe"—a negative statement of the Golden Rule.

important being ornaments and weapons. What induced the strong man to leave the weaker in undisturbed possession of such objects is not so easily settled. It is a question of fundamental importance if we are to *explain* the origin of private property; but as with many fundamental questions we have little data to help us to a decision and must leave the subject to those with a taste for controversy.

The next type is represented by tribes from the North American Indians or the Maories of New Zealand. There is now a considerable amount of private property in goods—in food, weapons, canoes, and most important of all in slaves. Agriculture is beginning to receive attention, although it is yet very primitive. The same patch of ground is seldom cultivated continuously, but after one piece has been exhausted a move is made to another. The results are not very satisfactory and consequently agriculture is looked upon with a certain measure of indifference and contempt. It is fit only for women and slaves; the serious and dignified business of life—hunting and war—is left for the free man. Such as it is, however, agriculture is already a source of wealth and its importance grows with the institution of slavery. Slaves are obtained by fighting, and as their usefulness increases the rewards of the successful warrior are magnified. Wealth accumulates and leads to distinctions of rank and power, and ere long chiefs begin to demand special privileges and do much to develope the idea of private ownership even in land.

Village communities.

The next stage is reached when we come to the village community, a type that has received special attention from a number of jurists[1] who have discussed it as it exists in India and Russia to-day as well as in Britain and other parts of western Europe in the past. Each tribe is divided into a number of smaller groups bound together by ties of kinship, real or imagined.

[1] Von Maurer, Nasse, Maine, Haxthausen, Tengoborski, Vinogradoff, Seebohm, Gomme, and others.

Agriculture has now become 'intensive,' the great discovery having been made that by proper treatment the same piece of ground may be cultivated from year to year. The arable land is distributed among the different families, often by lot, but the pastures are held in common by the clan. The chief has increased his privileges since the last stage; his land has in many cases become hereditary, and as a rule he claims large powers over all the territory that has not been allotted.

As time goes on the powers of the chief increase, and to meet his growing demands the claims of the kindred and the clan have to be set aside. The idea of private ownership in land thus fostered by the head of the state is disseminated by many forces—notably by the church in Western Europe—until at length our present stage is reached when private property seems simple and 'natural' and we have a difficulty in believing that any other system could ever have prevailed.

Place of the Anglo-Saxons.

Where in this scheme are we to place the Anglo-Saxons just before their descents on England? The question cannot be answered with certainty, but the evidence we have tends to show that they were in the stage of transition preceding that of village communities. As far as land laws were concerned their state was like that of the Maories or Red Indians. On this subject the sources of information from the side of history are two—the writings of Caesar and of Tacitus.

Caesar's description.

Caesar gives us two descriptions, one of the Germans generally, the other of a particular tribe, the Suevi. Speaking of the Germans as a whole he says that no one has a fixed quantity of land, but that each year portions are assigned by the chiefs to groups of families united by ties of kinship. The group occupies the land for a year and is then moved elsewhere. So too of the Suevi "Privati ac separati agri apud eos nihil est, neque longius anno remanere uno in loco incolendi causa licet[1]." About a

[1] Caesar, *de Bello Gallico*, IV. 1.

Tacitus.

century and a half later Tacitus writes with fuller knowledge. We cannot be sure that he is describing the same tribes as Caesar; but, if so, there has been a marked advance. The old wandering life has been given up and the tribe settled down in permanent villages. The arable land is changed from year to year, being allotted among the different members of the community in accordance with their rank. "Agri pro numero cultorum ab universis in vices occupantur, quos mox inter se secundum dignationem partiuntur....Arva per annos mutant[1]."

It must not be thought, however, that private property in land is unknown. There is a distinct touch of individualism, for each man has a homestead of his own which is clearly marked off from that of his neighbours. "Colunt discreti ac diversi....Vicos locant non in nostrum morem conexis et cohaerentibus aedificiis; suam quisque domum spatio circumdat[2]."

This is practically all we know from history of the land system of these early days. Several centuries elapsed from the time of Tacitus until the Saxons began their invasions of Britain. What happened in the meantime can only be conjectured, and indeed, as we shall see in the next chapter, it is long after the invasions were at an end before we have anything very definite on which to go. When, however, we do come again into the clear light of history we find much to suggest that the methods of which Tacitus wrote were employed by the invaders, the most abiding witness being the open field system of agriculture of which there are many traces even to-day[3]."

[1] Tacitus, *Germ.* c. xxvi. The text is doubtful. Some read vicis.

[2] Tacitus, *Germ.* c. xvi.

[3] See Seebohm, *English Village Communities*; Gomme, *The Village Community*.

CHAPTER II.

FIRST PERIOD. FROM THE SAXON INVASIONS TO THE NORMAN CONQUEST.

Scarcity of material.

WHEN we endeavour to construct a connected account of the land laws in Anglo-Saxon times we are constantly baffled by the scantiness of the materials at our disposal. The period before Augustine's mission affords us practically nothing of a trustworthy nature, and from that time till Domesday Book appears we have to rely almost entirely on the Charters—some 1200 in number. Now great as is the value of these charters, we must not forget that they are exotic in character. They give us but a one-sided view of the land laws of the day, telling us nothing (except by implication) of the laws that dealt with folkland; and so, while teaching us a good deal about the property of the great people, they leave us almost entirely in the dark as to the conditions on which the masses held their land.

The uncertainty of our knowledge of Anglo-Saxon customary law is well illustrated by the fact that scholars who have devoted themselves to its study are far from agreeing on the fundamental question as to whether that law is Celtic or Roman or Teutonic in its origin. Without entering into a discussion of this question perhaps we may be permitted to say that the better opinion is in favour of the German origin[1].

[1] See Maitland, *Domesday Book and Beyond*, p. 223.

Teutonic invasions.

We know that throughout the fifth and sixth centuries England was exposed to a series of invasions and that the old population was so completely crushed that but for the Celtic fringe we should have scarcely any trace even of its language. The land of the conquered country was, of course, distributed among the victorious invaders. "As an army they had obtained possession, and as an army they distributed the booty that rewarded their valour[1]." As to the mode of distribution we know little or nothing, but as each share was originally called Hlyt (lot) and afterwards Hid [contraction of Higid; Higan = family and so Hid = share of one household] we are naturally led to suppose that the new settlers obtained their shares by lot and that the family was regarded as the unit for purposes of settlement.

If we are justified in applying Tacitus' description of a German army to the invaders, we may picture them as a regular army led by a chief and divided into a large number of small groups, each group being bound together by ties of kinship and ruled by the noblest of the band. It seems natural to suppose that in the allotment of land this arrangement would be maintained, so that each group would have a district assigned to it and would form the nucleus of a village community.

Village communities.

The organisation of these village communities has been the subject of a great amount of learned investigation and not a little controversy. For our present purpose it may be sufficient to say that the head of each family in the village was a small 'peasant proprietor.' His house and curtilage were strictly his own and he had his strips of arable land, "subject however to certain customary regulations as to common cultivation." Every year the meadow land was allotted among the holders of the arable. In addition to this these landholders exercised certain common rights over the pastures and woods, rights that were regulated by the village assembly.

[1] Kemble, *Saxons in England*.

This state of affairs has given rise to some rather loose statements to the effect that communism was practised in early Anglo-Saxon times. Now, to say that the community 'owned' the land seems to confuse ownership with government and so does not make for clearness. Each villager's rights over his arable land and his rights of common over the waste were strictly his own—although in the exercise of these rights he was bound to conform to the regulations of the village assembly. Thus whatever may have been the case in other societies there seems little doubt that the Anglo-Saxon village community was "strictly individualistic at the core."

Modes of alienation —inter vivos.

Our knowledge of the modes of alienation of this folkland—as it was called—is exceedingly scanty. Alienation inter vivos was probably unheard of in the earliest times. The villager would not often want to sell his land, for on it his livelihood would depend, and if he did want to sell there would, as a rule, be none to buy. "Perhaps the very idea of a sale of land had not yet been conceived. However, in course of time as wealth amassed there are purchasers for land; also there are bishops and priests desirous of acquiring land by gift and willing to offer spiritual benefits in return[1]." Perhaps we may be allowed to guess something of the mode of conveyance from our knowledge of that in vogue among the Teutons and of the ceremonies that attended the transfer of copyholds in later times. "In all early legal systems" says Pollock "the transfer of property, or of the more important kinds of property, has to be effected by some kind of public ceremony. Frequently this ceremony is of a symbolic nature and is a substitute for the actual abandonment of possession in favour of another which is the most obvious way of putting that other in one's place as owner. Thus the transfer of land is completed by the delivery of a turf, a bough, or a straw taken off the land, the part representing the whole of the soil itself or of

[1] Pollock and Maitland, *Hist. Engl. Law*, II. p. 247.

its produce. There is much reason to believe that in England this was the manner in which the smaller holders of land, who knew not the ecclesiastical innovation of written charters or 'books,' were accustomed to transfer it before the Conquest. Certain it is that customs of this kind, long since dwindled to the emptiest formality, still exist in many copyholds. The transaction was proved by the witness of neighbours, who attended for the purpose of keeping it in memory[1]." We should add however that Sohm, Maurer, and Schmid deny that symbolical transfers were used at all before the Conquest, although it seems difficult to get over the references to such methods in some of the charters[2].

—wills. So far we have been speaking of conveyances of folkland inter vivos. It has been usual to say that the proprietor holding by folkright had no testamentary power of alienation. It seems, however, that there is nothing to support this statement except the well-known passage in Aldorman Aelfred's will in which, speaking of his son Aethelwald, he says, "And if the king will give him the folkland to the bôcland, then let him have and enjoy it[3]." From this it has been concluded that one could not dispose of folkland by will; but the suggestion of Prof. Maitland[4] that the legitimacy of the son was dubious seems a much more probable explanation of the clause. Indeed we have really no ground for supposing that all the land bequeathed in Anglo-Saxon 'wills' had been acquired by 'book.' The word folkland is used only once in these wills—namely in the one just referred to; but there are several instances of heirland (aerfelond) being contrasted with bookland, and this heirland we should include under the general title 'folkland.' Now we can point to several cases in which heirland was

[1] Pollock, *Land Laws*, 2nd Edit. p. 72.

[2] Kemble, *Cod. Dip.*: Nos 12, 37, 104, 114, 177, 1019 [referred to by Pollock].

[3] Thorpe, *Dipl.* p. 482.

[4] Maitland, *Domesday Book and Beyond*, p. 246.

disposed of by will. Thus in A.D. 837 we find Badanoth Beothing making over his 'aerfelond' to the convent at Christchurch[1], and about the same time Lufa "a humble handmaid of God" burdens her 'erfelond' with an annual gift to the brotherhood of Christchurch of "60 ambers of malt, 110 loaves, 50 white loaves, 120 alms loaves, one ox, one swine, 4 wethers, 2 weys of bacon and cheese, a mitta full of honey, 10 geese, and 20 hen fowls[2]." Moreover in the wills we meet with numerous bequests of isolated hides of land, and it is very improbable that these had all been 'booked.' Thus in A.D. 1002 we find Wulfric endowing the Abbey of Burton with a large quantity of land, among the rest being that at "Oxton, and Wingfield, and Snodesuic to Morton; and that at Tathwell and the land at Appleby that I bought with my money, and at Weston, and at Burton; and the hide at Sharnford to Wigston; and that at Hereburgebury, and Aldsworth, and Alfreton, and Eccleshall, and at Waddon, and one hide at Sheen[3]," and so on. Again in the will of Thurstân (A.D. 1045) we read "I give to Thurgot my page half a hide on which Aelstân resides at Ongar; and to Merwyn half a hide and the little enclosure at Mereden and to Sweyn half a hide[4]." There is nothing to suggest that these various lands had been booked to Thurstân and it seems more than probable that most of them were held by folkright.

However, even if this be so, it must not be thought that title by will was a common one among the holders of folkland. Practically all the 'wills' that have come down to us are those of very great people. Such people might hold land by folkright, and in that case there may have been nothing to prevent them disposing of it by will. On the other hand as to the common landholder it is perhaps somewhat improbable that he ever made a written will; but he may have exercised a power of disposition not unlike that of his greater neighbour

[1] Thorpe, *Dipl.* p. 476.
[2] Ib. p. 475.
[3] Thorpe, *Dipl.* p. 547.
[4] Ib. p. 575.

without the formality of writing. Perhaps he could make a post obit gift of his lands, leaving only a life estate to himself, and it is probable that in his last hours he could make a verbal disposition of his property and that this expression of his wishes would be respected. At any rate the influence of the clergy would be in favour of this power, as is illustrated by the question in Egbert's dialogue, "Can a priest or deacon be witness of the verba novissima that dying men utter about their property?" with the answer "Let him take with him one or two so that in the mouth of two or three witnesses every word may be established, for perchance the avarice of the kinsfolk of the dead would contradict what was said by the clergy were there but one priest or deacon present[1]."

Descent.

The one mode of acquiring folkland that has not yet been mentioned is title by inheritance. This indeed would be the usual and in early times probably the only method of acquisition. The rules of descent are very dark to us, but we are not here concerned with them. As a rule a man's land descended to his sons in equal shares, and this fact has led some writers to suppose that a form of 'birthright' existed as an institution in the England of these days. It is certain however that there is no trace of this in any of our records[2].

Summary of titles to folkland.

So far we have been speaking mainly of folkland. There has been too much guesswork, but with this oft-repeated caution as to the insecurity of the path we are following we may say that the titles to folkland were these:—

(1) Original allotment after the invasion, witnessed no doubt by the whole community.

(2) Inheritance from the original allottee.

(3) Conveyance inter vivos, evidenced probably by some symbolic transfer of possession, the neighbours being present to witness the ceremony and hand on the tradition

[1] Haddan and Stubbs, *Councils*, III. 404.

[2] On the subject of 'Family Ownership' see Ficker, *Untersuchungen zur Erbenfolge*.

of the transfer. In later times these ceremonies took place in the lord's court so as to obtain the testimony of a witness that never dies.

(4) Gift mortis causâ—evidenced by the word of two or more priests in attendance at the death bed.

(5) Possibly by will (cwide); but this somewhat doubtful and used, if at all, only by the greater folk.

Growth of the power of the greater men.

We have sketched rapidly the formation of a village community and have tried to discover the land laws that obtained there. But the country was much more than a mere collection of village communities. In the original partition of the land the leaders and great men among the invaders naturally obtained larger shares than the others, and time tended to increase rather than to diminish their superiority. Soon they began to add to their large estates large rights over the possessions of the common folk. How all these rights were acquired we have not documentary evidence to show, but it is not difficult to imagine the outlines of the process by which the changes were effected.

Commendation.

In the troublous days of early Anglo-Saxon history the ordinary peasant proprietor must have found his position far from secure and there would be much to urge him to seek the protection of some greater man. In this way probably began the process of 'commendation' of which we find frequent mention in Domesday Book in phrases such as these: "Pater Tori potuit ire quo voluit sed pro sua defensione se commisit Hermanno episcopo et Tori Osmundo episcopo similiter[1]," "quidam liber homo hanc terram tenens et quo vellet abire valens commisit se in defensione Walterii pro defensione sua[2]." This process of commendation did not always mean that the proprietor put his *land* under the protection of the lord, but that would usually be the case. In fact one of the chief objects in view was to protect one's title to the land, and the villager that could rely on the strong

[1] Domesday Book, I. 58. [2] Ib. I. 36.

arm and crushing oath of a great lord need have little anxiety about defects in his title. Now what did the lord get in return for this protection? That he obtained some 'valuable consideration' is certain; 'nothing for nothing' was the rule in those days, and doubtless the lord exacted more than the mere personal services of a sworn retainer. Probably this was only the beginning of a long series of encroachments on the part of the lord, encroachments that left him at the time of Domesday Book with a large number of valuable rights over the villagers' land which were quite unknown in the earliest times.

The King.

In the course of time the country was brought under the rule of a king. He was the greatest of the landholders and his power over the lands of those beneath him was correspondingly great. But it was not only by a process like that of commendation that the king's power grew. The village communities of which we have spoken were far from exhausting all the land in the kingdom. These communities were very much scattered, and the waste and uncultivated land between different villages was for long practically ownerless. However as the king's power increased he claimed dominion over such land and it soon came to be regarded as the king's land (terra regis), at least the king's power of exercising many rights over it was not disputed.

But the existence of this large extent of terra regis was not the only evidence of the king's growing power over land. Soon even the free villager owed many services to the king. On all were imposed the triple duty ('trinoda necessitas') of military service, repairing bridges, and repairing strongholds. Not that men had yet reached the theory that all land was the king's and that the tenant merely 'held' it 'of' the king in consideration of military service. As yet the freemen owned their land, but the trinoda necessitas was imposed on them all. In addition to this the landholder was bound to provide the king and his suite with provender (pastus,

victus) and this must often have proved a heavy burden. Another very important class of powers that the king exercised over the landholders was that of jurisdiction. In him was centred the national system of justice and police. He had the benefit of 'sake and soke' and into his treasury the profits of justice were poured. In addition to this, money taxes (tributum) were imposed for various public purposes, chiefly under the guise of 'defence.' Now these taxes must often have weighed heavily on the struggling peasant proprietor and often in his extremity he would be driven to take 'loans' from his lord. Every such loan would give the lord a fresh opportunity of striking a bargain and so of obtaining further exactions from the peasant in the way of increased powers over his land. No doubt in many cases the peasant would become so poor that the state would refuse to deal with him save through the medium of the lord, who would tend to become, in a way, responsible for the general good conduct of his underling. It was perhaps in this way that the lord began to exercise certain powers of jurisdiction over the free villagers.

Meanwhile the church had not been idle. Her work had not been confined to the lower classes, she had made converts in high places and ere long had persuaded the king to dedicate some of his land and his 'superiority' over land 'to pious uses.' This the king did by charter or 'book' and hence the name 'bookland.' It differed from folkland only in that it was always held by title of 'book.' The practice once begun[1] it grew apace, and by the time of Domesday Book a very large part of the country was held by this title. Most of the charters extant conveyed large tracts of land, or rather they professed to convey such tracts; but in most cases what was really granted was a 'superiority' over the land. It is true that the grantor generally spoke of the land as his own, but we must not expect too fine a choice of

Bookland.

[1] The earliest charter dates from about the beginning of the seventh century, see p. 19.

terms, especially in days when ownership and superiority were not clearly distinguished and the charters were drawn up after a foreign model and in a foreign tongue. Thus when the king granted a large piece of land "to God and the church of St X" he generally spoke of the land as his own, and declared that in future it was to be held "free from all manner of services" (the trinoda necessitas, however, usually excepted). By this he meant that his various rights over the land—his victus, pastus, tributum, sake and soke etc.—were in future to belong to the church of St X. The ordinary peasant proprietor was not disturbed in his possession and ownership; but the various dues that he formerly owed to the king went, after such a charter, to the church of St X.

Plan of the 'book.'

We must now examine the general plan of these Latin 'books.' The document began with a short invocation and went on to a pious effusion on the vanity of temporal things in comparison with joys that are eternal. "In course of time," however, "the piety of the recitals became more and more perfunctory. It became a philosophic reflection on the transitoriness of earthly affairs and finally evaporated, leaving behind some commonplace about the superiority of written over unwritten testimony[1]." After this effusion came the grant itself, with an enumeration of the various lands conveyed. Frequently the boundaries of the land were carefully stated—this part of the charter being usually in Anglo-Saxon. As a rule it was stated that the grantee was to enjoy the land during his life and leave it on his death to whomsoever he pleased. Then came the solemn sanction with a fearful malediction on all who infringed or diminished the grant and a blessing on those that improved it. Lastly we have the date and a long list of witnesses.

For our purposes the most important part of the document is the grant. The actual granting words are very varied. "It may be observed of them in general

[1] Maitland, *Domesday Book and Beyond*, p. 243.

that they are much simpler than the corresponding forms of the continent and especially that they show no such strict and formal combinations as those met with in the Roman documents. Do, dono, concedo, trado are the most in use, sometimes singly, sometimes combined; and one noticeable peculiarity is that in place of the present 'do' we usually have the future 'dabo[1].'"

Nature of estate granted.

The estate conveyed was usually equivalent to an unrestricted fee; but the book could make the land descend in any way. "The book is the lex possessionis of the land[2]"—a principle that is clearly laid down in a law of Alfred. The following are a few specimens of the wide powers given to the grantee:—

"Ita ut quamdiu vixerit potestatem habeat tenendi ac possessendi, cuicunque voluerit vel se vivo vel certe post obitum suum relinquendi[3]."

"liberam per omnia habeat potestatem ad habendum, possidendum, profruendumque seu vendendum aut commutandum, vel cuicunque ei heredi placuerit derelinquendum perpetualiter habeat potestatem[4]."

This plan of giving unrestricted powers of alienation to the grantee was the normal one, but several examples of limitations are to be met with. Thus:—

"in jus possessionemque sempiternam sibimet ad habendum quamdiu vivat, suoque relinquendum fratre germano diutius superstes si fuerit ab omnibus liberam servitiis alienigenarum exterarumque et sic semper in illa sanguinitate paternae generationis, sexuque virili, perpetualiter consistat adscripta[5]."

Again we find that estates for life were not uncommonly granted and it is well known that Bishop Oswald of Worcester was in the habit of granting land

[1] Kemble, Introduction to *Cod. Dip.*, I. xxviii.
[2] Brunner, *Zur Rechtsgeschichte d. röm. und germ. Urkunde.*
[3] Aethilbald, 736. K. *Cod. Dip.*, I. 96.
[4] Uuiglaf of Mercia, 831. K. *Cod. Dip.*, I. 294.
[5] Burgred of Mercia, 869. K. *Cod. Dip.*, II. 94.

for three lives. There is a famous letter from him to King Edgar explaining his policy in this matter.

The beneficial rights conveyed by these charters were very numerous. They included common of pasture; pasture for a definite number of horses or swine; rights of felling and carrying away wood; powers of jurisdiction—sac and soc, infangethef etc. etc.[1]; rights of teâm and of toll; and a large and important class of immunities from burdens such as the pastus regis, the king's feorm, opera and aedificatio regia, fines for crimes committed on the land (wîte), forfeiture to the king for crimes of a deeper dye.

We shall give an example of each of these benefits.

Examples of the benefits conveyed by 'books.'

"Cum campis, pascuis, pratibus, silvis, saltibus, piscuosis, maritimis fretibus, paludibus, vallibusque, dulcis salsuginesque, salisque stationibus, coctionesque et cum cunctis fructibus interius exteriusque, vel aliunde usque ad eas rite vel unquam pertinentia[2]."

"Illi hanc praenominatam terram tradere curabo, ut communem silbam, secundum antiquam consuetudinem, cum caeteris hominibus abeat[3]."

"Et unam molinam in torrente qui dicitur Holanbeorges burna, et in monte regis quinquaginta carratas lignorum, adjectis quattuor denberis, Hwetonstede, Heahden, Hese, Helmanhyrst[4]."

"Insuper etiam animalibus illius cum armentis regis pascuum donabo[5]."

"Ut omnium regalium tributum et vi exactorum operum et penalium rerum principali dominatione furisque comprehensione et cuncta seculari gravidine absque expeditione sola et pontium structura et arcium munitionibus secura et immunis permaneat[6]."

[1] Although these phrases do not occur in any authentic charter before the time of Edward the Confessor, Kemble has collected seven examples of similar grants of an earlier date. See his Introduction to *Cod. Dip.*, I. xlvi.

[2] Coênuulf of Mercia, 811. K. *Cod. Dip.*, I. 243.

[3] Cûthred of Kent, 805. K. *Cod. Dip.*, I. 232.

[4] Ecgberht of Wessex, 838. K. *Cod. Dip.*, I. 317.

[5] Aetheluulf of Wessex, 845. K. *Cod. Dip.*, II. 26.

[6] Aethilberht of Kent, 858. K. *Cod. Dip.*, II. 65.

"Et tibi Mildrithae abbatissae singulariter et ecclesiae tuae, navis onustae transvectionis censum qui a thelonearíis nostris tributaria exactione impetitur, perdonans attribuo; ut ubique in regno nostro libera de omni regali fiscu et tributo maneat[1]."

"nec rex suum pastum requirat vel habentes homines quos nos dicimus festig-men, nec eos qui accipitres portant, vel falcones, vel caballos ducunt, sive canes[2]."

"et illam terram trium manentium in Beonotlege etiam liberabo a pascua porcorum regis quod nominamus fearnleswe[3]."

"Et per pecuniam, piissimo jam tum domino meo rege Merciorum, libertatem terrarum illarum consecutus sum, id est cc. solidis et ut postea in diebus meis vel successorum meorum omni anno xxx. ut ab omnium fiscalium redituum, operum, onerumque, seu etiam popularium consiliorum vindictis, nisi tantum praetium pro praetio, liberae sint in perpetuum."

"omnimodumque in dei omnipotentis nomine interdicimus, ut si aliquis in hanc praenominatam terram aliquid foras furaverit, alicui solvere aliquid, nisi specialiter pro praetio, ad terminum, ad poenam nihil foras[4]."

"Istarum autem v mansarum quantitas justo valde judicio totius populi et seniorum et primatum ablata fuit ab eis qui eorum possessores fuerunt, quia aperto crimine furti usque ad mortem obnoxii inventi sunt[5]."

After this analysis of the contents of the charters a few examples of complete charters may be useful to illustrate what has been said about their general form. The first charter is of special interest as being the earliest that has come down to us.

Some complete charters.

"†. Regnante in perpetuum domino nostro Iesu Christo salvatore! Mense Aprilio, sub die IIII Kal. Maias, indictione VII, Ego Aethilberhtus rex filio meo Eadbaldo admoni-

[1] Aethilbald, 738. K. *Cod. Dip.*, I. 101.
[2] Coênuulf, 821. K. *Cod. Dip.*, I. 269.
[3] Burgred of Mercia, 855. K. *Cod. Dip.*, II. 59.
[4] Uhtred of the Hwiccas, 767. K. *Cod. Dip.*, I. 144.
[5] Aethelstân, 938. K. *Cod. Dip.*, II. 210.

tionem catholicae fidei optabilem. Nobis est aptum semper inquirere qualiter per loca sanctorum, pro animae remedio vel stabilitate salutis nostrae, aliquid de portione terrae nostrae in subsidiis servorum dei, devotissima voluntate, debeamus offerre. Ideoque tibi sancte Andrea, tuaeque ecclesiae quae est constituta in civitate Hrofibrevi, uti praeesse videtur Iustus episcopus, trado aliquantulum telluris mei. Hic est terminus mei doni: fram sûðgeate west, andlanges wealles, oð norðlanan to strâete and swâ eâst fram strâete oð doddinghyrnan, ongean brâdgeat. Si quis vero augere voluerit hanc ipsam donacionem augeat illi dominus dies bonos. Et si praesumpserit minuere aut contradicere, in conspectu dei sit damnatus et sanctorum ejus, hic et in aeterna saecula, nisi emendaverit ante ejus transitum quod inique gessit contra christianitatem nostram. Hoc, cum consilio Laurencii episcopi et omnium principum meorum, signo sanctae crucis confirmavi eosque jussi ut mecum idem facerent. Amen[1]."

"†. In nomine domini dei salvatoris nostri Ihesu Christi! Quamvis parva et exigua sint, quae pro amisis offerimus, tamen pius omnipotens deus non quantitatem muneris, sed devotionem offerentium semper inquirit. Qua de re Ego Sigeredus, rex dimidiae partis provinciae Cantuariorum, tam pro animae meae remedio, quam pro amore omnipotentis dei, terram aratrorum xx quae appellatur Aestingaham, tibi reverentissimo episcopo Earduulfo sanctae Hrofensis ecclesiae, cum universis ad se pertinentibus campis, silvis, pratis, pascuis, paludibus et aquis, et cum omni tributo quod regibus inde dabatur, in potestatem, cum consilio et consensu principum meorum, libenter in perpetuum perdono; ut possidendi vel habendi sive vendendi, vel etiam tradendi cuicunque voluerit, liberam per omnia habeat potestatem. Sane quia cavendum est, ne hodiernam donationem nostram futuri temporis abnegare valeat, et in ambiguum devocare praesumptio, placuit mihi hanc paginam condere, et una cum cespite terrae praedictae tradere tibi; per quam non solum omnibus meis successoribus regum sive principum, sed etiam mihi ipsi penitus interdico, ne aliter quam nunc a me constitutum est, ullo tempore de eadem terra quippiam agere audeant. Quod si qui forte observare neglexerint, et absque

[1] Aethilberht of Kent, April 28, 604. K. *Cod. Dip.*, I. 1.

digna satisfactione praesentis vitae impleverint infelices dies, audiant vocem aeterni judicis sub fine mundi dicentis ad impios: Discedite a me, maledicti, in ignem aeternum, qui praeparatus est diabolo et angelis ejus. Qui vero curaverint custodire nihilque inrogarint adversi, audiant vocem clementissimi arbitri, inquientis ad pios: Venite, benedicti patris mei, percipite regnum quod vobis paratum est ab origine mundi. Adjectis IIII daenberis in commune saltu, hoc est Uuealdseuuesha, Billincgden, Cealcbyras, Meosden, Rindigsel.

†. Ego Sigeredus rex hanc donationem a me factam, signum sanctae crucis propria manu scribendo, firmavi coram Bregouuino Archiepiscopo.

†. Ego Bregouuinus Archiepiscopus ad petitionem donatoris ante praedicti, consensi et subscripsi.

†. Signum manus Hereberhti Abbatis.
†. ,, ,, Baere Abbatis.
†. ,, ,, Bruno Abbatis.
†. ,, ,, Aescuualdi presbyteri.
†. ,, ,, Ecgbaldi comitis atque praefecti.
†. ,, ,, Ealdhuuni.
†. ,, ,, Esne.
†. ,, ,, Badohardi.
†. ,, ,, Aethelnothi.

†. Ego Eanmundus rex hanc piam donationem suprascriptam propria manu roborandam hoc signaculo sanctae crucis expressi, in loco cujus vocabulum est Godgeocesham; praesente venerabile archiepiscopo Bregouuino et consentiente consilio quippe atque consensu omnium optimatum et principum gentis Cantuariorum.

†. Ego Iaenberhtus abbas consentiens testis afferi et subscripsi. †. Ego Huuaetred abbas consensi et subscripsi. †. signum manus Eges nobilis. †. signum manus Balthardi. †. signum manus Aldhuni. †. signum manus Uda. †. signum manus Puda[1]."

It is useless to multiply examples, and enough has been given to illustrate the general nature of the 'book.' Clearly there would be many advantages in such a title to land, not the least being that disputes as to ownership

Advantages of the 'book': its increasing use.

[1] Sigiraed of Kent, 760. K. *Cod. Dip.*, I. 139.

would be much more easily settled by the written evidence of a charter than by the oral testimony of neighbours. All the earlier grants were to pious uses, but as time went on kings began to book lands to their thegns without mentioning any such uses. Still the charter did not cease to be ecclesiastical in tone and to be witnessed by a bishop or two for the purpose of giving force to the sanction of the anathema. In all cases the witnesses were great men and in later times the grant was usually said to be made "with the consent of the witan." Much has been made of this phrase by writers who have maintained that folkland was a sort of 'ager publicus' belonging to the community and not to be alienated without the consent of the witan as representative of the community. This theory held almost undisputed sway for more than half a century; but it has been practically disposed of in quite recent times[1].

Difference between folkland and bookland.

It seems clear now that the two names folkland and bookland did not represent different kinds of land, but merely different kinds of title. It should be remembered however that the term bookland was used rather widely not only for land, but even more commonly for rights over land; and further that it was always held by the churches and great men, never by the poor.

Alienation of book-land.

We have seen how it was originally acquired and have had several indications of the methods of alienating it. The grantee's powers of disposition were subject strictly to the terms of the 'book,' but he was usually given the freest powers of alienation both inter vivos and by will. He could sell, exchange, give or bequeath his land, but as a matter of expediency he generally obtained the consent of the king and witan before making any such disposition[2].

As to the actual ceremony of conveyance inter vivos we are much in the dark. Kemble[3] and Pollock[4] incline

[1] Vinogradoff, *Eng. Hist. Review*, VIII. 1.

[2] See Kemble, *Cod. Dip.*, II. 273; II. 379; V. 246, 378.

[3] Kemble, Introduction to *Cod. Dip.*, I. [4] Pollock, *Land Laws.*

to the view that some symbolic transfer took place even with the original grant. Others however are of the opinion that a mere transfer of the 'book' (the title deed) was all that was required; although in some cases the old book was handed over to the king and a new one obtained, while in others a written statement of the transference was appended to the original document[1].

Other written instruments: the writ.

Perhaps we have delayed long enough over the 'book'; but we must not leave the subject with the idea that the formal charter of which specimens have been given was the only written instrument dealing with the conveyance of land and of rights over land. The charter, as has been seen, was a very solemn document and nearly always in Latin. In later times however another written instrument came into fashion, what is sometimes called the 'writ.' A few specimens of this from Cnut are extant, but the form did not become a common one until the reign of Edward the Confessor. The writ is much less formal than the charter. It is nearly always in Anglo-Saxon and has little of the solemnity of the Latin document. In place of the invocation there is a greeting, the anathema is often omitted and the witnesses, if any, make no crosses. Further it differs from the charter in being evidential rather than dispositive in form, it declares that a gift *has been* made, it is not actually a gift. A few specimens will be a sufficient illustration:—

"I Cnut king greet amicably my bishops and my earls and all my thanes in the shires where my priests of St Paul's monastery possess land. And I make known to you that I will that they be worthy of their sake and soke, toll and team, within hide and without hide as fully and as freely as they most fully had in any king's day, in all things within town and without. And I will not consent that any man in any things misuse them. And of this are witness: Aegelnoth archbishop, and Aelwi bishop and Duduc bishop and Godwin

[1] See Brunner, *Geschichte d. röm. und germ. Urkunde*, p. 175.

earl and Leofric earl and Osgod Clapa and Thored and others enough. May God curse him that shall pervert this[1]."

"I King Eadward greet bishop Wulfing and earl Gyrth and all my thanes in Oxfordshire amicably and I make known to you that I have given to Christ and St Peter in Westminster the village in which I was born, by name Islip, and a half hide at Marsh, scot-free and rent-free, with all the things that thereto belong in mead and in water, with church and with church soen, as full and as complete and as free as they stood in my own hand, and so as Aelfgifu Emma, my mother, on my birthday gave it to me for a first gift and naturally bequeathed it. And I give them thereover sake and soke, toll and team, and infangenetheof, and blódwite, and wardwite and hamsoke, and forsteall, grithbryce, and mundbryce and all the rights that belong to me. I now greet my beloved kinsman Wigod at Wallingford and I enjoin thee that in my stead thou give these lands into the possession of the saint: for I will on no account allow that any man have any authority there in any things, or at any times, save the abbot and the brothers for the monastery's necessary requirements. And whoso shall faithfully hold this alms, may God and God's mother hold him in everlasting bliss. And whoso avert it, be he averted from God to the rigid torture of hell's inmates, unless he on this earth the more rigidly make amends. God and St Peter's favour preserve you[2]."

Wills.

Only one more title in which a written instrument was used remains to be noticed. This is the so-called will (cwide). It has already been mentioned when dealing with folkland; but although its use there was doubtful there is no uncertainty as to its employment in the disposition of bookland. Indeed numerous examples have come down to us and of these we shall append a few. It should be noted that the will is invariably in the Anglo-Saxon language and is drawn up without any regard to form.

"I Aelfred, king of the West Saxons, with God's grace and with this witness, declare how I will with regard to my

[1] Cnut (1023). Thorpe, *Dipl.*, p. 319.

[2] Edward the Confessor, 1053. Thorpe, *Dipl.*, p. 368.

inheritance after my day. First to Eadward, my elder son, I give the land at Shallon in Cornwall, and Hartington and all the bookland that Leofheah holds....[After further bequests to this son he proceeds to give land to Winchester; to his younger son; to his daughter; to his nephews—and then various bequests of money and other chattels.]...And I will, if to any man I have not paid any money, that my kinsmen at all events pay it. And I will that the men to whom I have bequeathed my booklands give them not from my kin after their day; but I will that after their day it go to the next of kin to me, unless any of them have children; then it is to me most desirable that it go to the one begotten on the male side, while there shall be any worthy of it...[1]."

"Here is made known that Brihtric Grim gives the land at Rempton to the old monastery, after his day, with the hide that he afterwards acquired to that land, and gives up the charter that King Eadred chartered to him to the old monastery in addition to the charter that King Aethelstân previously chartered; on the condition that he have the usufruct of the land [þone bryce þes landes] as long as his time may be; and let it afterwards go to that place so provided as it stands, with meat and with men, and with everything for his soul's comfort.

And of this are to witness: Dunstân archbishop and Aethelwold bishop, and Aelfstân bishop and Aethelgar abbot and the convent of Glastonbury and the two convents at the old monastery and at the new monastery in Winchester[2]."

Gradual decline of the peasant.

We have now examined the principal parts of the legal machinery by means of which the greater folk acquired the extensive rights that they exercised over those beneath them. Before leaving the subject, however, it may be well to call attention to the gradual degradation of the peasant. At the Conquest he fell suddenly, on being handed over to the tender mercies of a foreign lord[3], but he had been going down for long. We have seen that many of the rights of the lord had

[1] Will of King Alfred (880—885). Thorpe, *Dipl.*, p. 487.
[2] Brihtric Grim (964—980). Thorpe, *Dipl.*, p. 518.
[3] See Domesday Book, I. 13; I. 141; II. 1; II. 282 b.

been obtained in the process of 'commendation' as consideration for protection, others had their origin in direct grants from the crown[1]. At first these grants might not have been adverse to the poorer people, they were merely placed under a new set of rulers. However, as has been noted, there were many other forces at work that tended to bring the peasant under the power of his lord. Once the poor man was in a position of dependence, the royal grants gave the lord greater opportunities of oppression, and we are not left to speculation alone for the suggestion that many of the rights that the lord came to exercise were obtained by the great title—might.

[1] Domesday Book gives us examples of the grantees from the crown disposing of the right of jurisdiction (or more strictly the right of presiding in Court and taking the profits of justice). See D. B. II. 313. Such a right 'ran with the land,' so that if the land were alienated the new holder came under the old lord's soke, though he might be 'commended' to some other lord.

CHAPTER III.

SECOND PERIOD. THE NORMAN CONQUEST TO EDWARD I.

Tendency to feudalism before the Conquest.

It is a trite remark that long before the Conquest there were many forces at work making for feudalism. It would be foreign to our purpose to trace this process in detail, but even from the brief sketch in the last chapter we cannot fail to gather some suggestions on the subject. In addition to what has been said of the growth of seignorial powers it should be noted that 'bookland' and 'loanland' did much to bring men near the fundamental idea of feudal times. 'Bookland' usually came from the king and naturally returned to him if anything went wrong. Thus as early as A.D. 825 we find a case of escheat—the grantee having died heirless and intestate[1]. At the same time escheat in the case of felony was probably regarded as one of the profits of justice, and these naturally went to the king or his grantee. Loanland too must have done much to familiarise men with notions of dependent tenure. For services were always rendered in return for a loan, a common service in Oswald's time being "to fulfil the law of riding"—a close approximation to the duties of a tenant by knight's service. The loan shaded off gradually into the gift and so men must have got used to holding land apparently freely and yet owing rents etc. to other people.

All this, however, must not lead us to minimise the

[1] Kemble, *Cod. Dip.*, v. 76.

Influence of the Conquest.

influence of the Conquest on the development of our land laws. Its chief effect—as far as we are here concerned—was to alter the theory on which all land was held. In future there was to be nothing in the nature of absolute ownership for a subject, everything was to be looked upon as originating from the king. In addition to this great change of principle there were startling changes of ownership. Forfeitures were the order of the day, the English magnates being replaced by Frenchmen according to the will of the king. Only one object did the Conqueror respect, and that was the Church. The large rights that ecclesiastical bodies had acquired over various lands before the Conquest were generally confirmed[1]; but with this exception practically all the great landowners had to make way for Norman successors, and no one's title was secure unless supported by the grant, re-grant, or confirmation of the king.

Although, however, the change of ownership was so complete, the discontinuity in the land laws was not so great as might be imagined. William claimed to be the rightful king of England, and the lands that he parcelled out to his favourites were to be held in accordance with the old laws—the Norman lord being nominally the representative of his Saxon 'antecessor.'

We have no reason to believe that the original allotment of lands by the Conqueror was made by means of written instruments, and indeed it seems highly improbable that this was the case. Most of the documents dealing with land which have come down to us from the times of the Norman kings and which are not merely records of disputes about title are confirmations of grants made in earlier times to religious houses and grants of powers of a seignorial kind very similar in form to those that preceded the Conquest. To take a single example of each of these classes of documents from the reign of William we have :—

[1] See e.g. Bigelow, *Placita Anglo-Normannica*, pp. 13, 22 (Ely); 31 (Abingdon); 34 (St Andrews).

(A) Confirmation by the Conqueror of former grants of a manor and church made to the monks of Westminster: A confirmation by the Conqueror.

"Willelmus Rex Angl., Lanfranco Archiepiscopo & Odoni Episcopo Baiocensi & Comiti de Kent & omnibus ministris & fidelibus suis Francis & Anglis de Kent, salutem. Sciatis quod ego concedo & firmiter praecipio, ut Ecclesia Sancti Petri Westmonasterii & Vitalis Abbas & monachi ejusdem ecclesiae, perpetuo habeant manerium Leosne & ecclesiam suam in eadem villa & cum omnibus rebus quae ad praedictum manerium pertinent in terra & in aqua, in bosco et plano, & in omnibus rebus & consuetudinibus & legibus & cum omnimoda libertate, ita honorifice & quiete, sicut Aedsenus Sanctum Petrum & fratres ejusdem Ecclesiae Westmonasterii inde haereditavit pro salute animae suae & sicut Rex Aedwardus cognatus meus melius & plenius & liberius illa praedicto concessit Sancto: Et defendo super hoc, ne ullus eis aliquam ullo tempore injuriam sive calumniam vel torturam faciat; quia nolo ut aliquis de elemosina mea ullam intromissionem ullo tempore habeat nisi Abbas & monachi ad usum monasterii.

T. Petro episcopo Cestrensi & Willelmo filio Osteni & Roberto filio Wimarc[1]."

(B) Writ of William—saying that he has granted certain powers to St John at Beverley. Writ of the Conqueror.

"†. I King William greet all my thanes in Yorkshire, French and English, amicably. And I make known to you that I have given to St John at Beverley sake and soke over all the lands that were given in the day of King Edward to St John's monastery, and also over those that Archbishop Ealdred has since acquired for it, in my days. In 'witword' or in 'caupland' be it all free, as regards me and every man, save the bishop and the monastic priests. And let no man be so bold as to undo what I have declared to Christ and St John. And I will that there ever be monastic life and canonical congregation while any man lives. God's blessing be with all Christian men that promote the honour of the saint. Amen[2]."

[1] Madox, *Formulare Anglicanum*, LXII. p. 37.

[2] Thorpe, *Dipl.*, p. 438. [The original is in Anglo-Saxon.]

The grants from this early period vary somewhat in form, at one time they appear to be 'dispositive,' at another merely 'evidentiary,' although soon the latter form predominates. However it would serve no useful purpose to follow out the varying forms of these documents throughout the early middle ages. It will be better to turn at once to a later time when legal practice has settled down and we are enabled to take a general survey of its outline. Under Bracton's guidance much can be learned about our subject at a time when feudalism had reached its greatest stature. By following this great authority and illustrating what he tells us by documents from different reigns we should have little difficulty in obtaining a fairly clear view of the various forms of title from the Conquest to Bracton's day. This done we may turn with profit to the records of disputes about title that have come down to us from the period under consideration.

Plan to be adopted.

In the first place it must be noted that every title to land has its root in *seisin*. The claimant of a freehold[1] will be called upon to show either that he himself has been seised of the land or that he is the representative by descent of some one that had seisin. Further, as evidence of this seisin, he will be required to prove that he, or the ancestor through whom he claims, enjoyed the fruits of the land by taking 'esplees.' Of all this we shall have ample evidence when considering some of the cases in Bracton's *Note-Book* and elsewhere.

Importance of seisin.

The titles to freehold during the period may be divided into two great classes—title by inheritance (of which hereafter), and title by gift (including, of course, sale or exchange). Now a gift must be made by "feoffment with livery of seisin." For the feoffment a written instrument was not absolutely indispensable, indeed even up to the end of this period "words of mouth" would

Feoffment with livery of seisin.

[1] We are not here speaking of tenure in villeinage, at will, or for term of years. Tenure in villeinage will occupy us later, the other two forms of holding land are outside the limits of our discussion.

suffice. But there were obvious advantages in a written document and so we find numberless instances of charters of feoffment, some of which will be given immediately[1] We have already laid stress on the fact that a real delivery of possession was insisted on to give a good title. In Bracton's time this livery was often accompanied by ceremonies of various kinds. These were usually of the nature of symbolic delivery, and it is probable that in earlier times this symbolic delivery was employed in certain cases as a convenient substitute for actual transfer of possession and was even recognised by law as sufficient.

Modes of giving livery of seisin.

Writing of the modes of giving livery of seisin Madox says:—

"There were divers ways of giving seisin: as per fustem, per baculum, per haspam, vel annulum and by other symbols either proper in their own nature or accommodated by use or designation of the parties to signify a transferring of the possession or seisin from the feoffor to the feoffee. Jubell Fitz-Alured (tempore Will. I.) gave the monks of Toteneis the church of St Marie etc. 'in manu Domini Tetbaldi qui ibidem praesentialiter erat loco omnium fratrum:—ecclesiam ei tradidit *per clavem monasterii et cordam signi et cum ipsius cultello donum super altare misit.*' Gunter, abbot of Thorney (tempore Will. I.), was seised of the church of Giveldane, *per clavem ecclesiae.* King William II. gave the abbot of Tavistock seisin of the manor Wlurinton *per cultellum eburneum*, which knife was laid up in a shrine at that abbey and had inscribed on its haft words signifying that donation. William of Albini gave the monks of Wymundham seisin of a manor by *a silver cross.* William Peverell granted and released to the abbot of Thorney the church of Bolehirst—*abbati per quandam virgam in manu tradidit*[2]" and so on.

In some cases we find the charter of feoffment treated as a symbol of the land itself and handed over in place of delivering the land. Thus when Sewhal son of Joseph

[1] See p. 33.

[2] Madox, *Formulare Anglicanum*, p. ix.

enfeoffed Thomas de Nevill of certain land he delivered to him the charter of feoffment—

"dedit et cartâ suâ confirmavit Tomae de Nevill et fidelitatem recepit illius coram baronibus de Scaccario coram quibus carta praedicta lecta fuit in haec verba omnibus audituris et visuris has litteras:—'Et ut haec in perpetuum rata sint et inconcussa, ea tam praesenti scripto quam sigilli mei appositione confirmavi et coram baronibus de Scaccario praesentem *cartam saepe dicto Tomae manu propria liberavi*[1].'"

Ceremony of livery sometimes performed in Court.

Sometimes the ceremony was performed in Court—probably with the object of obtaining an undying witness. Thus Geoffrey de Ferdis enfeoffed Benet de Blakeham of certain land before Richard, bishop of London, Walter Fitz-Robert, William de Warenne, and Reginald de Argentom—justices errant in Norfolk and Suffolk[2]. Again we find that Oliver de Argentom gave the king half a mark

"ut scribatur in Magno Rotulo quod Reginaldus de Halfwurd patruus suus dedit et concessit ei coram baronibus regis ad scaccarium apud Westmonasterium totam terram suam de Halfwurd quam dedit ei jure hereditario tenendam de Reginaldo de Argentom patre ipsius Oliveri, per servitium XVI. d. partis feodi I militis praeter terram de Walhage et quod praedictus pater ipsius recognovit coram praedictis baronibus quod recepit homagium ipsius Oliveri de praedicta terra cum pertinentiis et ei inde cartam suam fecit[3]."

Object of the ceremonies.

The object of these various ceremonies was doubtless to obtain clear evidence of the donor's intention in making the gift. Livery of seisin was always regarded as a *sine quâ non* to the validity of the feoffment, but the examples given above show that a symbolic delivery was often deemed sufficient. In Bracton's time many of the practices peculiar to these symbolic transfers were still maintained; but they were no longer allowed to take the place of *real* delivery of possession, and when used at all

[1] Madox, *Form. Ang.* p. xi.; *Mag. Rot.* 6.
[2] Ibid. p. xi.
[3] Ibid. p. xi.

were merely subsidiary to actual delivery and by way of further assurance.

Form of the charter of feoffment.

Of the charter of feoffment we have already remarked[1] that its form after the Conquest was somewhat unsettled. However by the end of the twelfth century a common form was reached and throughout the thirteenth century there were few departures from this standard, except that a clause about 'assigns' crept in and 'warranty' became prominent. Some examples of these charters will be more useful than a lengthy description:—

(A) Grant of lands by the Bishop of Bayeux (half-brother of the Conqueror) with the king's licence.

"Willelmus rex Anglorum Lanfranco archiepiscopo Cantuariensi et Hamoni vicecomiti, et R. filio comitis G. et Haimoni vicecomiti et omnibus tamnis de Kent, Francigenis et Anglicis, salutem. Sciatis episcopum Baiocensem fratrem meum pro amore Dei et pro salute animae meae et suae dedisse Sancto Augustino quicquid habet Fordivicum, tam in terris et pratis et domibus et consuetudinibus, quam in aliis rebus, et quod dedit licentia mea sciatis illum dedisse[2]."

(B) A.D. 1107—1118. Grant of lands to Lewes Priory by William, Count of Surrey.

"Ego Willelmus Comes suthreię dono ꝺo & sc̃is aꝑtis ejus petro 7 paulo ad locum sc̃i Pancratii pro anima patris mei & matris meę & pro anima mea & fratris mei rainaldi tres [hidas in mulis] scumba & quicquid ricoardus Archidiaconus de patre meo & de [me ubicumque ten]ebat. Hęc omnia tam libera & quieta ab omnib3 causis dono sicut [est īra de fal]emella.

Testib3 his quoꝝ nomina subscripta s̃t.

S̄. † Wiłłmi comiti; S̄...; † S̄. Rotb̃ti de petªponte

† S̃. Wiłłmi filii godefredi de petªponte...;

S̃. Radulfi filii radulfi; † S̃. Godefredi de petªponte.

† S̃. Nigelli generi godefredi. † S̃. Hunfredi[3]."

[1] See p. 30.

[2] Bigelow, *Placita Anglo-Normannica*, p. 13.

[3] Round, *Ancient Charters*, No. 5.

We have given this charter in its original (unexpanded) form. It should be noted that the instrument appears to be 'dispositive.'

(C) Grant by Henry I. to Walter de Gloucester of all the land of Eadric. A.D. 1123.

"H. rex Anglorum. T. Uigorn Episcopo & R. comiti Glocē & omnibus Baronibus & fidelibus suis de Gloecesterscira salutem. Sciatis me dedisse & concessisse Waltero de Gloecester in foedum & in hereditate totam terram Edricii filii Chetelli. Et volo et firmiter praecipio ut bene & honorifice & quiete & libere teneat cum omnibus consuetudinibus suis sicut praedictus Edricius vel Chetellus pater ejus unquam melius & honorabilius & quietius & liberius tenuerunt.

Testibus Pag̃. filio Iohannis & Willelmo de Pirov. & Hugone Bigoto & Waltero de Bello Campo apud Portesmudam. In t^{a}ns fretatiōe mea[1]."

As Round remarks, the importance of this charter lies in the parallel it must present to the grants made by the Conqueror. The grantee does not receive any estate by name. He is merely placed in the shoes of Chetel, who thereby becomes, in the language of Domesday Book, his 'antecessor.'

(D) [Circa A.D. 1170.] Grant to Belvoir Priory by John de Aincurt of a carucate of land out of his demesne in Granby (Notts.) with other pieces of land and common pasture.

"Notū sit om̄ibꝫ fidelibꝫ in đno tam present...go Joħs de Ainc...concedo đo...de Belveeir 7 monachis ibidem đo servientibꝫ...mę meę 7 ꝑ animabꝫ patris 7 matris mei...anima Oliveri fris mei cuj' corp' ibidem requies...animabꝫ omniū ꝑdecessoꝝ meoꝝ un...tā trę de dominico meo in villa grenesti 7 unam tophtam cū tophta Osberti presbīti 7 tantū...q^{a}ntū ꝑtinet ad carrucatā terrę Ricardi de Criviel 7 cōmunem pasturam in ꝑpetuā elemosinā possidendam solutā 7 quietā ab om̄i impedimento 7 seculari servicio.

Huj' donationis testes sunt...[Here follow twenty-five witnesses][2]."

[1] Round, *Ancient Charters*, No. 10.
[2] Ibid. No. 43.

(E) A feoffment in fee-simple of a messuage made by the master of the Templars to the monks of Bruere.

"Universis Christi fidelibus praesentibus et futuris, frater Aimericus de sancto Mauro, Miliciae Templi in Anglia magister humilis, salutem. Noverit universitas vestra, nos de communi consilio & assensu totius capituli nostri in festo S. Martini apud Dineste concessisse & hac praesenti carta nostra confirmasse Deo & Beatae Mariae & monachis de Brueria, mesuagium situm juxta Molendinum nostrum de Flieta quod Willelmus de Salerna de nobis tenuit; Habendum et tenendum cum omnibus pertinenciis suis & jure hereditario perpetue possidendum libere solute & quiete: solvendo inde singulis annis Domui Templi sex solidos pro omnibus serviciis & consuetudinibus ad duos terminos scilicet ad Pascha tres sol. & ad Festum S. Michaelis tres solidos. Et ut concessio nostra firma & stabilis futuris temporibus permaneat, eam tam praesenti scripto quam sigillo nostro confirmavimus. His testibus [seven witnesses][1]."

(F) A feoffment in fee of a garden.

"Sciant praesentes & futuri quod ego Hugo filius Roberti Ligeri dedi & concessi & praesenti carta confirmavi, Roberto filio presbiteri de Brumore, pro homagio & servicio suo, Gardinum meum in Brumore & Floddam inter domum Rogeri Bum & domum Willelmi Rufi: Tenendum sibi & heredibus suis de me & heredibus meis per liberum servicium sex denariorum per annum, ad festum Sancti Michaelis pro omni servicio. Et si ego vel heredes mei praedictum Gardinum cum Floda warentizare non poterimus, ego vel heredes mei dabimus dicto Roberto vel heredibus suis Escambium ad valenciam saepedicti Gardini cum Flodâ, scilicet quattuor acras de hereditate nostra in Middelfurlang. Et pro hac donatione & concessione dedit mihi praedictus Robertus duas marcas argenti. His testibus [seven witnesses 'cum toto hundredo'][2]."

In this charter the clause of warranty should be noted, a clause that—like the mention of assigns[3]—became usual

[1] *Form. Ang.* CCCVII. p. 185.

[2] Ibid. CCCXXII. p. 193.

[3] As to assigns see e.g. *Form. Ang.* Nos. 308, 312, 313, 327.

from the beginning of the thirteenth century. It will be observed also that the consideration for the feoffment is mentioned in the charter[1].

Void charters.

Before leaving the subject of charters we must consider the grounds on which they might be disputed. Bracton[2] enumerates the following:—(*a*) the charter was forged, (*b*) the donor was of unsound mind when he drew up the document or had lost his memory through an illness that afterwards proved fatal, (*c*) the donor was an infant, (*d*) the charter was obtained through duress, or (*e*) through deceit or (*f*) through mistake—provided this were not due to the donor's negligence. If an attempt were made to upset the charter on any of these grounds the question was decided by a jury composed of the witnesses to the charter "et preterea xii tam milites quam alios legales, liberos et discretos[3]." These men were enjoined to inquire into the dispute and appear before the court on a certain day to settle the difficulty. As has been so often said, proof of livery of seisin was essential, and if this were forthcoming 'hearsay' evidence as to the making of the charter would be sufficient[4].

To prove a charter it was not sufficient for the witnesses to say merely that they were "*asked* to be witnesses" of the charter, and it went much against the validity of that document if the witnesses could not declare that they were present either when it was made or when it was read. Moreover presence at the confirmation of a charter was not deemed sufficient, though it would seem that to have been at the making of the preliminary agreement was considered satisfactory. But the charter could be proved otherwise than by witnesses, for example by comparing the signatures on the deed with others produced and approved in court and acknow-

[1] Most of the charters given above pass the fee simple. But conditional fees are frequently met with in this period, see e.g. *Mag. Rot.* 5, 13.

[2] Bracton, f. 396 b.

[3] Ibid. f. 396.

[4] Ibid. f. 398.

ledged as those of the donor. Such a proof was completely satisfactory unless there was something obviously suspicious about the instrument, e.g. an erasure in a narration of fact[1]. The seal could be proved genuine by comparing it with acknowledged seals of the donor.

We have said that the most usual mode of conveying a freehold inter vivos was by feoffment with livery of seisin. This however was not the only method employed and we must turn now to the alternatives and say something of releases, quit-claims, surrenders and especially of fines.

Release and quit-claim were used when the donee was already in possession, as when he was a tenant for life or years or merely a disseisor. In such cases if the donor wished to pass the fee simple he did so (at least in the 13th century) by means of a sealed instrument or by a court record, although it is probable that at an earlier date an 'abjuration' of claims—sometimes accompanied by a symbolic transfer to the donee[2]—was all that was necessary. Release and quit-claim.

(A) Release from Richard de St Denis of a hide of land to the church of Battle.

"Sciant omnes quod ego Ricardus de Sancti Dionisio cum uxore et heredibus meis clamamus quietam omnem calumniam de hida de Janglentuna quam Tiedbertus ecclesiae Belli dedit & Willelmus de Braiosa per cartam suam concessit ut sic bene eam ecclesia teneat sicut illi melius data fuit & sicut eam unquam melius tenuit vel tenere debuit. Et die qua hoc concessum super altare posui, effecti sumus participes societatis Ecclesiae & xxx sol. a monachis accepi: praesente Rotberto filio meo & his testibus [eleven names and 'aliis multis'][3]." Examples of releases.

(B) A.D. 1233. Release of a messuage in fee to the nuns of Newcastle. Common seal of the town of Newcastle affixed.

"Omnibus hoc scriptum visuris vel audituris, Petrus filius

[1] Bracton, f. 398.

[2] See e.g. *Guisborough Cartulary*, p. 71.

[3] *Form. Ang.* DCLVII. p. 368.

Hawysiae de Pert, Mautilda & Wincey sorores ejusdem Hawysiae, salutem. Sciatis nos relaxisse & quiete clamasse Deo & Sancto Bartholomeo & monialibus de Novo Castro totum jus & clamium quod nos vel heredes nostri unquam habuimus vel habere poterimus in uno mesuagio cum pertinentiis in Novo Castro, quod petebamus de Johanne Molendinario & de Emma uxore sua per breve Domini Regis de Recto in Curia Novi Castri quod quidem mesuagium dicebant se tenere de sanctimonialibus de Novo Castro. Pro hac autem quieta clamacione praedictae Sanctimoniales dederunt nobis xx sol. sterlingorum. Et in hujus quietae clamationis & ad majorem securitatem praesens scriptum communi sigillo Novi Castri signatum fieri fecimus. Actum in curia Novi Castri ad festum Sancti Michaelis anno gratiae MCC tricesimo tertio, Hugone de Bedeford, Willelmo de Hexhild, Rogero filio Willelmi, Henrico de Karliolo, tunc praepositis: multis aliis tunc praesentibus[1]."

Surrender.

In case a tenant surrendered his land to his lord, livery of seisin could be dispensed with, as the lord was already seised 'in service.' Still even in this case deeds of surrender were not uncommon. Here is an example:—

"Ego [Walterus] de Infirmari reddidi et quietam clamavi dominis meis, Priori et Can. de Gyesburne toftum cum crofto ei adjacente quod in villa de Gyesburne per eorum sufferentiam tenui de eisdem. His testibus...[2]."

Fines.

Turning next to the consideration of the most important alternative to the charter of feoffment—the 'final concord' or 'fine'—we cannot introduce the subject more fitly than by a quotation from Cruise:—

"When property first became the subject of alienation it was found necessary to adopt some authentic mode of transfer, which might secure the possession and evince the title of the purchaser. By the ancient common law a charter of feoffment was in general the only written instrument whereby lands were transferred or conveyed. But although this assurance derived great authenticity from the number of witnesses by whom it was usually attested and from the solemn and public

[1] *Form. Ang.* DCLXXVII. p. 375.

[2] *Guisborough Cartulary*, CXIV. p. 50.

manner in which livery of seisin was formerly given, yet still it may be supposed that inconveniences would frequently arise either from the loss of the charter itself or from the difficulty of proving it after a lapse of years. These circumstances probably induced men to look out for some other species of assurance which should be more solemn, more lasting and more easy to be proved than a charter of feoffment. Experience must soon have discovered that no title could be so secure and notorious as that which had been questioned by an adverse party and ratified by the determination of a court of justice; and the ingenuity of mankind soon found out the method of drawing the same advantages from a fictitious process.

To effect this purpose the following plan was adopted; a suit was commenced concerning the lands to be conveyed and when the writ was sued out and the parties appeared in court, a composition of the suit was entered into with the consent of the judges, whereby the lands in question were acknowledged to be the right of one of the contending parties. This agreement being reduced to writing was enrolled among the records of the court where it was preserved by the public officer, by which means it was not so liable to be lost or defaced as a charter of feoffment and would at all times prove itself; and being substituted in place of the sentence which would have been given in case the suit had not been compounded, it was to be held of equal force with the judgment of a court of justice[1]."

To avoid a misconception perhaps we should add that a 'fine' was a substitute only for the charter of feoffment, it did not transfer the ownership of the land and thus was not complete as a conveyance until the grantee had obtained actual *seisin* under the sheriff's writ. Further it must be remembered that we are speaking of land and of the period before the fourteenth century.

We have already[2], when dealing with feoffments, seen a feoffee paying money to have an account of the feoffment entered on the rolls, but it was not till late in Henry II.'s

[1] Cruise, *Essay on Fines and Recoveries.*

[2] p. 32.

reign that the 'final concord' appeared. Soon, however, this method of obtaining evidence of title became popular and an enormous number of records of fines have been preserved[1]. The earliest fines were in the form of indentures[2], one part being retained by each party to the suit. After 1195 three chirographs became usual, one of the number going as a permanent record to the treasury. The document usually began with a statement of the place at which the fine was levied, of the time[3], and of the persons composing the court. Then came the names of the parties to the suit and a specification of the subject of transfer. Next the plea and the concession made by one of the parties and finally the consideration—the name of the county being subscribed.

Form of a fine.

We shall give an example from each reign from Henry II. to Henry III.

Examples of fines.

(A) "Haec est finalis Concordia facta in curia Domini Regis apud Westmonasterium, die Veneris proxima post Ascensionem Domini Anno xxxi Regni Regis H. secundi, Coram J. Norwicensi Episcopo, Rannulfo de Glanvilla Justiciariis Domini Regis & Ricardo Thesauricario & Godefrido de Luci & Huberto Walteri & Willelmo Basset & Nigello filio Alexandri & aliis fidelibus Domini Regis ibi tunc praesentibus, inter Walterum Abbatem de Westmonasterio & Ricardum & Willelmum fratres de Padinton de toto tenemento quod ipsi tenuerunt in Padinton de Ecclesia de Westmonasterio. Unde placitum fuit inter eos in Curia Domini Regis scilicet quod praefati Ricardus & Willelmus clamaverunt quietum in perpetuum de se & omnibus suis successoribus & heredibus totum & praefatum tenementum & quicquid juris in eo habebant, sine ullo retinemento praefatae ecclesiae de Westmonasterio & Abbati & terram cum omnibus pertinentiis suis ei reddiderunt: & pro hac resignatione praefatus Abbas dedit eis xl marcas argenti & quattuor conredia in ecclesia de Westm. quorum

[1] In 1809 ten cartloads (about a ton each) of transcripts of fines were removed to the Record Office.

[2] A facsimile is given in Hunter's collection, p. xxviii.

[3] In this it differed from the charter of feoffment, which was usually undated in the present period—before Edward I.

duo sunt ad opus praedicti Ricardi & Willelmi usque in XII annos sequentes; et alia duo ad opus uxorum praedicti Ricardi & Willelmi cum caritatibus et pitanciis quamdiu ipsae mulieres vixerint[1]."

(B) "Haec is finalis concordia facta in curia Domini Regis apud Westm. die Dominica proxima post festum S. Hilarii, anno regni regis Ricardi sexto, coram H. Cantuar. archiepiscopo & Hereberto Saresberiensi episcopo, Osberto filio Hereri, magistro Thoma de Husseburn, Ricardo de Heriert, Hugone Peverell, justiciariis domini regis & aliis fidelibus domini Regis ibidem tunc praesentibus, inter Gaufridum Abbatem & monachos de la Briuwyre tenentes & Rogerum de Sanford petentem de duabus hidis terrae in Middleton, quas Robertus de Witefeld dedit praefatis Abbati & monachis in puram & perpetuam elemosinam; unde placitum fuit inter eos in curia domini regis: scilicet quod praefatus Rogerus de Sandford quietum clamavit de se & heredibus suis totum jus & clamium quod habuit in praefata terra, praedictis Abbati & monachis in perpetuum: et pro hac quieta clamatione & concordia, praefati abbas & monachi dederunt ipsi Rogero tres marcas argenti[2]."

(C) "Haec est finalis concordia facta in curia domini regis apud Westm. à die sancti michaelis in tres septimanas anno regni regis Johannis IIII coram G. de Insula, Reginaldo de Cornhull, Waltero de Crepsing, Reginaldo de Argentein, justiciariis & aliis baronibus domini regis tunc ibi praesentibus, inter Robertum de Sap petentem, et Willelmum Priorem de Suthiwerke tenentem, de IIII acris prati cum pertinentiis in Tadelewe, unde placitum fuit inter eos in praefata curia: scilicet quod praedictus Robertus remisit & quietum clamavit praedicto Priori & successoribus suis, totum jus & clamium quod habuit in praedicto prato de se & heredibus suis in perpetuum: et pro hac quieta clamantia fine & concordia, praedictus Prior dedit praedicto Roberto unam marcam argenti[3]."

(D) "Haec est finalis concordia facta in curia domini regis apud Coventriam à die Sanctae Trinitatis in quindecim

[1] *Form. Ang.* CCCLVIII. p. 217.
[2] Ibid. CCCLX. p. 218.
[3] Ibid. CCCLXIII. p. 220.

dies, anno regni regis Henrici filii regis Johannis vicesimo, coram Roberto de Lexinton, Olivero de Vallibus, Johanne de Halecote, & Willelmo de Ludington, justiciariis itinerantibus & aliis domini regis fidelibus tunc ibi praesentibus, inter Robertum de Haleford & Amiciam uxorem ejus & Petrum de Parva Cumpton petentes, et Hugonem Priorem de Orthbiria tenentem, de triginta & sex acris terrae cum pertinenciis in Tisho, unde placitum fuit inter eos in eadem curia: scilicet quod praedicti Robertus, Amicia, & Petrus remiserunt & quietum clamaverunt de se & heredibus ipsorum Petri & Amiciae, praedicto Priori & successoribus suis & ecclesiae suae de Orthbiria, totum jus & clamium quod habuerunt in tota praedicta terra cum pertinenciis in perpetuum. Et pro hac remissione quieta clamancia, fine, & concordia, idem Prior dedit praedictis Roberto, Amiciae & Petro quattuor marcas argenti[1]."

Advantages of a fine.

The extract from Cruise with which we introduced the subject of fines referred to some of the obvious advantages of this method of transfer over the ordinary feoffment. But we must not leave the subject before calling attention to what was, for our purposes, a still more important attribute of the final concord. Once a person had obtained seisin and a fine in his favour *his title could not be disputed by anyone unless their claim was set up within a certain short period.* Bracton says:—"He must put in his claim within a month from the beginning of the other action unless a just impediment intervened—as that he was out of the country, or of unsound mind at the time, or an infant, or in prison, or the fine was made in secret, the chirograph having been made and delivered for fraudulent purposes before the lawful time[2]"—i.e. fifteen days after the concord was made in court.

Restrictions on alienation.

We have delayed long enough over the description of the most important methods of conveying a freehold inter vivos; but we cannot leave the subject without a

[1] *Form. Ang.* CCCLXVII.

[2] Bracton, f. 436.

brief consideration of the question whether the so-called 'free' holder was always free to alienate his property in the ways that have been discussed. The subject is a difficult one owing to the vagueness that seems to have prevailed in this matter. In fact all that can be said of the earlier law (before 1217) is that the tenant was free to alienate provided that his action did not 'seriously impair' the interests of his lord. This right of interference the lord could assert in the manorial court, and as a matter of policy it was always wise to obtain the consent of the lord to an alienation. And so in most of the charters of this period we find that the lord generally 'confirmed' the gift.

The Great Charter of 1217 speaks of restraint on alienation in the well-known words: "No free man shall henceforth give or sell so much of his land as that out of the residue he may not sufficiently do to the lord of the fee service due to him which pertains to that fee" ["Nullus liber homo de cetero det amplius alicui vel vendat de terra sua quam ut de residuo terrae suae possit sufficienter fieri domino feodi servitium ei debitum quod pertinet ad feodum illud"][1]. Even this is somewhat vague; but nothing more definite can be said as to restraints on the alienation of tenements held by mesne lords. Serjeanties seem to have been inalienable without the king's consent from an early time, and in 1205 John ordered the sheriffs to seize all such lands that had been alienated since the beginning of the reign of Henry II. without the royal assent. Moreover a somewhat strict law grew up for the king's *immediate* tenants, so that by the time of Edward I. they could not alienate at all without the king's consent.

No wills of land.

In another direction the freeholder's powers of alienation were even more seriously curtailed—this was in the matter of testament. The so-called will (cwide) of Anglo-Saxon times has been already discussed and it has been

[1] *Magna Carta* (1217), c. xxxii.

seen that the bequest in that case was really of the nature of a post obit gift. No sudden change in this matter was effected by the Conquest; but as soon as the courts were regularly organised under Henry II. they exerted themselves to stamp out the custom. The reasons for this policy are given by Glanvill in a well-known passage:—

"Licet autem ita generaliter cuilibet de terra sua rationabilem partem pro sua voluntate, cuicunque voluerit, libere in vita sua donare; in extremis tamen agenti non est cuiquam hactenus permissum; quia possit tunc immodica fieri hereditatis distributio, si fuisset hoc permissum illi qui fervore passionis instantis et memoriam et rationem amittit, quod non nunquam evenire solet; unde presumeretur quod si quis in infirmitate positus ad mortem, distribuere cepisset terram suam quod in sanitate sua minime facere voluisset, quod potius proveniret illud ex furore animi quam ex mentis deliberatione. Posset tamen hujusmodi donatio in ultima voluntate alicui facta ita tenere, *si cum consensu heredis fieret et ex suo consensu confirmaretur*[1]."

For some time after this wills have little interest for our present subject, for a freeholder could no longer rest his title on a will. Not that wills disappeared from this date, they were not uncommon, but they were strictly without *legal* effect. In order to obtain a good title the 'devisee' had to get actual seisin and confirmation at the hands of the heir. Now the heir was not bound by law to do this, and if—as often happened—he did comply, the devisee's title really rested on a feoffment or surrender from the heir and not on the 'will.' It is true that for a short time in the thirteenth century the courts seemed inclined to support a testamentary power of alienation in the case where a man held land that had been granted to him 'and his legatees' (or some such phrase); this however must be regarded as but a temporary aberration[2].

On the other hand it must be noted that there were

[1] Glanvill, lib. 7, c. 1.

[2] Of course we find wills restored later.

exceptions to this general rule. The holders of gavelkind land and of tenements in certain favoured boroughs could alienate their property by will[1]. We shall not turn aside from the broad current of the law to explore these exceptions, but some deviation may be made for London owing to its peculiar importance. In that great centre every citizen from time immemorial enjoyed a power of disposition by will. Even there, however, certain restrictions were imposed by custom, e.g.—a husband could not give his wife a larger estate than one for life; nor could he devise the tenements that he held in right of his wife[2]; an infant, a lunatic, or a feme covert could not make a will of lands or tenements. The will was usually enrolled in the Court of Hustings, "the same being first proved in open court on the oaths of two of the subscribing witnesses thereto and produced at one of these courts[3]." This enrolment was not essential to the validity of the will, but was the wiser practice.

Exceptions to general rule as to wills.

The nature of these wills may be illustrated by a few abstracts from Sharpe[4].

"A.D. 1259. Hardell (Ralph). To Philippa his daughter tenements in Kyrnnelane, parish of Paternoster church. To Sibil his daughter an annual quit-rent of four marks issuing from the house of Nicholas Hardell, contiguous to the church of S. Martin in the Vintery. To his wife, by way of dower and legacy, all his rents and tenements near the lane of Richard le Gras and extending towards the Thames; remainder to her heir. To Ralph and John his sons and to the survivor of them, if either should die without an heir, the tenement which he bought of Reyner de Burgeye. To Johanna his daughter, wife of Peter de Frowick and her heirs, rents in Chepe and Tower Street. To Alice, wife of Ralfe de Rokeslegh, a tenement in the parish of S. Mary de Hilla. All his ferms he leaves for the maintenance of his wife and children. The residue of his goods to be divided

[1] See Bracton, f. 272.

[2] Calthorp, *Ancient Customs and Usages of the City of London.*

[3] Emerson, *Courts of Law of the City of London.*

[4] *Calendar of Wills enrolled in the Court of Hustings*, London.

into three parts; one part to be expended for the good of his soul among the poor of London, the other parts to be divided between his wife and children remaining under her care. A portion of his immoveables to be sold, if necessary, by his executors for the payment of his debts[1]."

"A.D. 1279. Westminster (Bartholomew de). To Marjory his wife his capital mansion in the parish of S. Andrew de Holeburne; also houses in New Street for life; remainder to Dionsia his daughter and in default of heirs the same to be sold. [Marjory was present at the time of probate and said that she claimed no more in the said mansion than a life estate][2]."

We have remarked[3] that a testator could not bequeath more than a life estate to his wife; if he gave more she had to claim only a life estate or lose everything.

Descent.

We must turn next to the subject of title by inheritance or descent. It has been said that in the earliest days this was the almost universal mode of acquiring land, so that as son succeeded father with changeless monotony the expectant heir gradually came to be looked upon as one having rights in the land, rights that the tenant could not alienate without the consent of his heir apparent. The Conquest did not alter this state of affairs, for the 'feodum' was essentially a heritable estate and the expectant heir had something to say as to its alienation. This has been already referred to and it is constantly illustrated in charters of the twelfth century in which the heir generally assents to if he does not actually join in the gift. By the time we reach Glanvill, however, the law is somewhat vague. Thus:—

Rights of the heir apparent.

"Every free man, being a tenant of land, may give with his daughter or any other woman a *certain* part [quandam partem] of his land by way of marriage gift, whether the heir consent or not.... Anyone also may give to whomsoever he pleases any part of his free tenement by way of remuneration for services or in favour of a place of religion by way of alms

[1] *Calendar of Wills enrolled in the Court of Hustings*, I. 3.

[2] Ibid. I. 43.

[3] Ante p. 45.

[in elemosinam] with the result that, *if the gift has been followed up by seisin*, the land shall be held for ever by the donee and his heirs, if it were granted to him as an estate of inheritance [jure hereditario].... And, speaking generally, anyone may in his life-time freely give to anyone a *reasonable* part [partem rationabilem] of his land at his pleasure... A gift made to anyone in a last will may hold good, *provided it be made with the consent of the heir and be confirmed by him.* When anyone makes a grant of land by way of marriage gift or in any other mode, either he possesses hereditary land only or acquired land, or both. If he has hereditary land only he may, as has been said, give a certain part of that inheritance to any stranger he pleases. If, however, he have many legitimate sons he shall *hardly without the consent of the heir* grant to his younger son any part of his inheritance.... If, however, he have nothing but land that he has purchased, he may make a gift of a portion of it, but not to the extent of the whole of the purchased land, *because he may not disinherit the son who is his heir.* However, if there be no son or daughter begotten of his body, he may then give any part of his purchased land to anyone he likes, or the whole of it, for an estate of inheritance.... In case he has both purchased and hereditary land then he may give any part he pleases of his purchased land, or the whole of it, to any other person in perpetuity—and he can nevertheless give also *part* of his hereditary land according to what has been said above, provided he does it *reasonably.* It is further to be observed that if anyone that holds land in free socage has more sons than one who ought all to be admitted to the inheritance in equal shares, then it is true without reservation that the father cannot make grants either of hereditary or of purchased land to any one of his sons in excess of the reasonable share of the whole inheritance that belongs to such son[1]."

Affairs in such a state evidently marked a period of transition. The expectant heir had still some rights, but Glanvill found it impossible to define them clearly. All he could say was that the father might alienate a

[1] Glanvill, VII. 1.

'reasonable' part, and that the son must not be totally disinherited. Evidently by this time the heir's expectation had lost much of its value and by the end of the century it had gone. When Bracton wrote he could lay it down definitely that the words 'and his heirs' in a charter were words of limitation only and gave nothing to the heir apparent[1].

We have been discussing the heir-*apparent's* rights in the land and have seen them vanish at the close of the twelfth century. It need scarcely be added that this loss did not affect the rights to his ancestor's realty immediately on the death of that ancestor—provided of course that the ancestor had not made a valid disposition of the property by one of the methods described above. Indeed, in spite of the increasing powers of alienation on the part of the tenant, title by descent remained the commonest of titles, as is seen at once on examining any record of cases such as that which Bracton's Note-Book affords.

Legitimacy.

With the actual laws of descent we are not here concerned, but a word or two as to 'legitimacy' may not be out of place. The validity or otherwise of a marriage was a question to be settled by the 'spiritual' courts, but it is important to notice that in certain circumstances a child might inherit even though his parents' marriage was pronounced unlawful. Thus, says Bracton, "If a woman in good faith marries a man that is already married, believing him to be a bachelor, and has children by him, such children will be capable of inheriting[2]." On the other hand a bastard was not rendered capable of inheriting by the subsequent marriage of his parents, although the court Christian would regard him as 'legitimate.' However in case a bastard obtained seisin of his father's lands and his heir succeeded him the actual holder could not be ousted by the real heir of the original tenant. Evidently the law as to legitimacy was singularly inconsistent and 'inelegant.'

[1] Bracton, f. 17.
[2] Ibid. f. 63.

Dower. These questions of legitimacy and marriage naturally lead to the subject of 'dower.' It has been usual to regard this as a species of gift and to trace its origin to the morgen-gifu that was common among the Teutons and was mentioned occasionally in Anglo-Saxon documents[1]. Be this as it may, we find that in the period now under discussion dower had become an important form of title and was considered at some length by Glanvill and Bracton. In their days it might be defined as the right that a widow could claim to a life estate in a certain share of her late husband's realty. In order that she might support this claim her marriage must have been a 'lawful' one, any difficulty on that matter being settled by the ecclesiastical courts. Moreover the temporal courts insisted that the appointment of dower should be made publicly and with solemnity at the church door[2], otherwise the appointment was nugatory even although the marriage were without a flaw. Again, a woman had no claim to dower if she married an infant without the consent of his guardian, nor if she herself at the time of her husband's death was too young for the marriage to be consummated[3]. As to the effect of divorce, Glanvill says that a woman could have no dower if she were divorced for misconduct[4], while Bracton makes any dissolution of marriage deprive the wife of her dower[5]. According to the custom of certain places a widow also lost her dower on marrying again or being found guilty of unchastity.

Glanvill[6] and Bracton[7] agree that 'reasonable' dower was one-third part of all the lands and tenements that the husband had "in his demesne and so in fee that he could endow her therewith" on the day of the espousals, and further that if there were no specific appointment

[1] e.g. Thorpe, *Dipl.*, p. 596.
[2] Bracton, f. 92.
[3] Ibid. f. 92. Afterwards this age was fixed definitely at nine years.
[4] Glanvill, VI. 17.
[5] Bracton, f. 92.
[6] Glanvill, VI. 1.
[7] Bracton, f. 92.

of dower[1] (dos nominata) it was assumed that the wife was to have this share[2]. When the wife was simply endowed with a third part of her husband's lands—there being no specific appointment—she could not have a share in anything that by its nature or by custom was regarded as indivisible[3], but was compensated elsewhere. She could take nothing of the chief messuage, nor of anything within the close. A house, however, was to be built for her "to the value of a third part, i.e. in breadth and in length, but not in the value of the buildings." "The assignment of the messuage having been made, let a third part be given to her of everything that her husband had in domain—one-third of the arable land, one-third of the meadows, one-third of the woods, one-third of the pastures, one-third of the services of freemen, one-third of the escheats[4]." Even of the fish-ponds *outside* the close she was to have one-third of the profit "vel tertium piscem, vel jactum retis tertium, secundum quod conveniret[5]."

It has been said above that in the absence of specific dower the widow was entitled to a third of all the lands and tenements that the husband held *on the day of the espousals*. This was certainly the law in Glanvill's day and it seems to have been the practice under Bracton; but in strictness the doweress could claim more than when Glanvill wrote. Thus the charter of 1217, speaking of the widow, says "assignetur autem ei pro dote sua tertia pars totius terrae mariti sui quae sua fuit *in vita sua* nisi de minori dotata fuerit ad ostium ecclesiae[6]"; and shortly after Bracton's time this became the actual practice.

When the wife's interest began.

The wife's interest in her dower land commenced at the moment of appointment, so that if the husband

[1] If the wife accepted specific dower—which need not be of the value of one-third part of the land and could not be more—she had to be content with that appointment and could claim nothing further.

[2] Bracton, f. 95. [3] Ibid. f. 97. [4] Ibid. f. 97.

[5] Ibid. f. 98. [6] Magna Carta (ed. 1217), c. vii.

transferred land that had been named as the dower of his wife she could claim it back at her husband's death. In such a case the tenant would have to seek compensation from the husband's heir. If there had been no specific appointment of dower the husband's feoffee could keep his land, and the widow must seek compensation from the heir. If, however, the heir had nothing to give then, according to Bracton[1], the feoffee must give up his land to the widow. On this point, however, Glanvill is not quite so clear, but inclines to think that the feoffee was safe in both cases if the heir had enough to compensate the widow[2].

Curtesy.

Something has now been said of marriage as a mode of acquiring an interest in realty; to complete the picture the husband's share in the bargain must next be considered. "The husband," says Bracton, "is guardian as being the head of the wife[3]," and this guardianship was not without its substantial advantages. In fact the husband took the profits of all the lands to which his wife was entitled during the marriage, and this was a right that he could alienate. Further, if a child were born[4] that could possibly inherit from its mother, the husband acquired a still larger interest in his wife's lands. He could then hold them for his whole life after his wife's death, and that whether his child lived or not and even if he married again. This right gave rise to what was called 'tenancy by the law of England' and at a later date 'tenancy by the curtesy of England.' It should be noted that a wife could not alienate her land without the husband's consent and that, in later times, the only way to obtain a good title, otherwise than by descent, to the lands of a married woman was through the instrumentality of a fine to which both husband and wife were parties.

[1] Bracton, f. 93.
[2] Glanvill, vi. 3.
[3] Bracton, f. 429, b.
[4] "And heard to cry within the four walls."

No prescription to freehold land.

We have now passed in review the chief titles to freehold land within the present period. Before proceeding to other topics it should perhaps be remarked that as yet there was no prescriptive title to freehold land.

Limitation of Actions.

There was, however, a limitation of actions. The most important of these actions was that begun by the writ of right[1], and in an action initiated by this writ the claimant, if his title were by descent, had to prove that his ancestor was seised and took esplees 'in the time of such a king.' Now this time could not be dated too far back in history. When Bracton wrote the limit was the coronation of Henry II. Before 1237 the death of Henry I. was the critical period and in 1275 the boundary was finally fixed at the coronation of Richard I. The reason for this limitation is obvious when we consider the mode of proof required in case of dispute. Bracton puts it in this way:—

"Et est ratio, quia ultra tempus illud non poterit quis aliquid probare, licet jus habeat in re; cum nullus aliquid probare possit ultra tempus illud, ex quo loqui non poterit de visu suo proprio, vel de visu patris sui, qui ei injunxit quod testis esset si inde audiret loqui[2]."

We shall quote two cases from Bracton's *Note-Book*, the first to show the working of this "virtual statute of limitations" and the second to illustrate the advantage of long possession.

(A) Richard de Hof v. John de Reingay. Richard claimed by descent from his grandfather who (he said) was seised and took esplees in the time of Henry I. This however was outside the prescribed limit, so that the claim could not be considered[3].

(B) Marjory Osbert v. Richard Pauncefot and others. Richard vouches Peter son of Osbert to warranty. He says that he holds the land as the son and heir of his father Osbert and that his father was seised in his demesne as of fee and right in the time of Stephen and

[1] Bracton, f. 328. [2] Ibid. f. 373.
[3] Bracton's *Note-Book*, pl. 280.

throughout the times of Henry II. and of Richard and that he died seised in the time of John. Marjory has a different story; but she has no proof of feoffment except her own statement and so, since Peter (the warrantor) stood seised for a long time, the decision goes against Marjory. "Et quia Margeria nihil ostendit de feffamento nisi simplicem vocem suam et quia idem Petrus extitit in seisina per multum tempus, consideratum est quod Petrus inde sine die et teneat in pace et Margeria in misericordia[1]."

[1] Bracton's *Note-Book*, pl. 507.

CHAPTER IV.

SECOND PERIOD CONTINUED. INCORPOREALS AND VILLEINAGE.

Scope of this chapter.

THROUGHOUT the last chapter we were occupied with freehold estates in land and paid little or no attention to the great division of real property known as 'things incorporeal,' nor to any tenure less dignified than a freehold. The present chapter must therefore be devoted to these neglected branches of our subject.

When dealing with the law in Anglo-Saxon times before the Conquest we had to remark that a clear distinction between the ownership of land and the possession of governmental powers over it was not to be expected. To a certain extent this is true of the period now under discussion, so that we must not look for any well-marked difference in the matter of title between corporeals and incorporeals. The distinction is not always very clearly seen even to-day, and it was much obscured by the intense realism of the early feudal ages[1]. This being the case we should hardly have separated this chapter from the last were it not that the break is convenient. At the same time we shall find that during this period incorporeals differ from corporeals in two important particulars as to title—marriage is comparatively unimportant in the incorporeal sphere, while prescription, far from being unknown, is very much to the fore.

[1] "Revera nullum jus esse poterit sine corpore et subjecto cui adhaeret." Bracton, f. 378, b.

Let us look at some of the more important incorporeal things in turn, and first at seignorial jurisdiction and other lordly rights. It is well known that every lord with tenants enough to hold a court might establish such a court. This feudal court, however, need not detain us long here. It will be much more prominent when the non-free tenants are dealt with[1], but when the free only are being considered the lord's right to hold a court does not usually seem a very valuable or important one. As a rule it could bring him little money, nor could it do much to increase his power over the tenants. Indeed it was afterwards disputed whether a lord could exact suit of court from his men, and in 1267 it was settled that to insure this right the lord must have expressly bargained for it when enfeoffing his tenant or else must rely on prescription. On the other hand there were many cases in which the lord possessed seignorial rights of a very lucrative character. These were not due directly to the feudal relation between lord and tenant, but were regarded, at least in theory, as having their origin in specific grants from the Crown. Such grants of immunities from taxation were common within this period and, just as in earlier times, 'freedom from taxation' usually meant that the grantee was to enjoy the benefit of a tax that would have otherwise gone to the royal treasury. As an example of extensive immunities we shall give the charter of the Templars:— Seignorial rights.

"Joh's Dī gr̃a t̃c. Sciatis nos concessisse et psenti carta nr̃a confirmasse Do et Bé Marie et fr̃ibꝫ milit̃ Templ̃ Salom̃ oms r̃onabiles donac̃ones terraꝝ hōiū et elemosinaꝝ eisd̃ a pdecessoribꝫ nr̃is v̄l ab aliis in p.tito v̄l a nob̃ inpsnti collatas v̄l infuturo a regibꝫ v̄l ex alioꝫ liḃalitate cōferendas v̄l alio ni° adq̄sitas v̄l adq̄rendas tam ī ecc̃lis q̄m ī rebꝫ et possessōnibꝫ mundanis. Qr̃ volum et firmit pcipim qd̃ pd̃ci fr̃es et eoꝫ hōies oms possessiones et elem̃ suas h̃ant et teneant cū omibꝫ liḃtalibꝫ et liḃis consuetudinibꝫ et q̄etanciis suis, in Charter of the Templars.

[1] See *post*, p. 69.

bosco et plano, in pratis et pasturis, in aquis et molendiñ, in viis, in semitis, in stagñ et vivariis, et marisc̃, et piscariis, et g[a]ngiis, et virgultis, infra burgū et ext[a] burgū, cū socca et sacca, tolł et them, et infangenthef et utfangenthef, et hamsoca, et grithbriche, et blodwita et fichwita, et.....wita, et fredwita, et hengewita, et leirwita, et flemengsfrith, et murdro et lat°ciño, et forstal et ordel et oreste infra t̄p et ex[a] t̄p, et ī om̄ibꝫ locis et cū om̄ibꝫ cāis q̄ sūt vel ẽe posst. Concedim' & inperpetuū qđ predc̃i fr̃es q[i]eti sint de om̄ibꝫ mīis, et qđ ip̄i et om̃s hōies sui liḃi sint ab om̄i scotto et geldo et om̄ibꝫ auxiliis Regū et vicecomiti et om̄iū ministraliū eoꝝ et hidag̃ et carrac̃, et denegeld̄, et hornegeld̄, et excitibꝫ, et wapetac̃, et scutag̃, et taillag̃, et leslag̃, et stallag̃, schiris et hundredis, et placitis et querel, et warda, et wardpeni, et avpeni, et hundredpeni et borenhalpeni et thethinpeni et de op̄ibꝫ custelloꝝ parcoꝝ et pontiū clausuris et ōi careio et sumag̃ et navigio et dom̃m regaliū edificac̃one et oīm̃da op̄ac̃one. Et p̄hiberni' ne bosci eoꝝ ad pdc̃a opa vel aliq[a] alia ullo m° capiat[r]. Volum' & qđ liḃe et sufficiēt in q[a]libꝫ occasione possint cap̄e de om̄ibꝫ boscis suis ad us'dom' sue q̄n voluint: ne p̄pt hoc in foriscō de wasto vel in mīa ponant[r]. om̃sq t'ras suas et essarta sua et homiū suoꝝ jā fc̃a et q̄ fient impost'ū assñsu regio, eis ī p̄petuū q[i]eta c̄lammam' de wasto et rewardo et de visu forestarioꝝ, et om̄ibꝫ aliis consuetudinibꝫ. Concedim' & qđ ip̄i fr̃es Templi et hōies sui liḃi sint et q[i]eti ab ōi tollones ī om̄i foro et ī om̄ibꝫ nūdinis et ī om̄i t[a]nsitu pontiū, viar̃, et maris, p̄ totū regnū nr̃m et p̄ om̃s t'ras nr̃as ī q[i]bꝫ eis dare liḃtates p'sum' et ōia m'cta sua et hōiū suoꝝ sint similiter in' p'dc̄is locis ab oī tollones q[i]eta. Concedim' & eis et confirmam' qđ si aliq[i]s hōiū suoꝝ p̄ delicto suo vitā v̄l m̃brum debeat amitt'e v̄l fug'it et judic̃o stare nolu'it v̄l aliud delic̃ fec'it p̄ q° debeat sive ī curia ñra sive ī alia cur̃, similr si aliq[i]s hōiū suoꝝ sit ī m'cia erga nos v̄l baḷłos nr̄os, p̄ q[a]c̃ꝫ c̄a v̄l delicto v̄l forisfc̃o, m'cie et m'ciamenta p'dc̄is fr̄ibꝫ reddant[r], s'vata regie potestati justic̃ mortis et membroꝝ. Hec om̄ia p'dc̃a et ōia alia sc̃laria s'vicia et cōsuetudines que ī ħ sc̄pto nō cōprehendunt[r] eis conced' et confirmam' inp̄petuā elem̄ cū om̄ibꝫ liḃtatibꝫ et liḃis cōsuetudinibꝫ q[a]s regia potestas liḃiores alicui domui religionis cōfre p[t].per D̄i amore et p̄ āia H. Rx p̄ris nr̄i et H et R fr̃m nr̄oꝝ quond̄ Regū i

Angł et ꝑ salute ñra et m̃ris m̃e A. Regiñ, et om̄iū añcessoꝝ et successoꝝ nr̃oꝝ. Et ꝑhibem' suꝑ forisfc̃urā nr̃am qd̃ nł̃is eis v̄l hōibꝫ suis cont[a] h[a]c cartā ñram ī aliquo forisfaciat, q iꝑos et om̃s res et possessiones suas et hōiū suoꝝ in custodiā et specialē ꝑtec̃onē ñram suscepim'.

T. etc.

Dat̃ ꝑ manū H. Canť. arch. cancełłii ñri aꝑ Sagiū XVI die Julii anno regni nr̃i primo[1]."

We need scarcely say that the grants in this charter are unusually numerous. In fact the document has been transcribed at length not so much to illustrate the form of a grant as to show how much the king had at his disposal. Generally, of course, only a few of these rights are given away at one time, a normal charter being like this:—

"Joh's Dī gr̃a etc. justic̃ etc. Sciatis qd̃ concessim' Alañ fil Com̃ qd̃ t'ra ej' de Walthamsocne sit q[i]eta de sectis hundredoꝝ et schiraꝝ et wappetac̃ et de auxilio vicecom̃ et de om̄ibꝫ exac̃onibꝫ q̃ ad nos ꝑtinēt exceptis q̃ ꝑtinēt ad coronā ñram. Another charter granting immunities.

T. H. Canť. arch̄. cancełło ñro aꝑ Vallē Rodolii XVIII die Julii anno regni ñri primo o ÷ q[a]diu erit ī s'vicio ñro. T. etc.[2]"

These royal grants of powers of jurisdiction, or more accurately of the profits of justice, do not, in spite of their profusion, account for the extensive claims set up by the greater lords towards the end of the present period. Probably many of these 'rights' were acquired by might and enforced under the sanction of the sword and the anathema. At any rate when Edward I., on his return from Palestine, set up an inquiry into the origin of the franchises and the various powers claimed by the lords, most of these claimants relied entirely on a prescriptive title. After much dispute it was settled that a continuous seisin since the coronation of Richard I. would constitute a good title, and a check was put on the further growth of such powers. Other means of acquiring seignorial powers.

[1] *Rot. Chart.* p. 1–2. [2] Ibid. p. 4.

It has been seen then that, partly owing to royal grants and partly to the natural working of feudalism, the lords often obtained extensive powers of taxing their tenants. These taxes we might look upon as rents, they 'ran with the land' and had to be paid by anyone in possession of that land. In order to alienate such a rent the lord (A) had to give the alienee (B) *seisin*, and this was done by handing over something valuable in the name of seisin of the rent. However, such transfers were not common before the thirteenth century, and when they did occur it was thought necessary to execute and deliver a deed as evidence of the transaction. These deeds were very like the charters of feoffment of land discussed in the last chapter. Britton, writing just outside the limits of this period, gives the following as the normal form of deed :—

Alienation of these rights.

Deed of grant.

"A touz ceux qi ceste lettre verrount ou orrount J de B salutz. Sachetz moi aver doné a P pur le bon service qe il me ad fet (ou pur autre certeyne chose) C. livres de annuele rent en N et en S, issi que des maners avauntditz prenge la avauntdite rente de an en an al jour de S. Michel, en qi qe unqes meyns les maners devynent, a tote la vie mesmes celi P [ou en fee a ly et a ses heirs et ses assignez] et *dount en noun de seisine jeo ly ay baillé C sous devaunt meyn*, et qe le avauntdit fee ne ly soit detenu et qe ceo doun soit estable, jeo oblige les avauntditz maners a la destresce mesme celi P [ou a P et ses heirs et a ses assignez] issint qe ils les pusent destreyndre en qi meynes qe il devivent ataunt avaunt cum jeo mesmes fere poray et ataunt qe ils sereint parpayez del princepal fee et de lour damages. Et jeo Johan et mes heirs garranterons le avauntdit fee et a avauntdit P et a ses heirs et a ses assignez a touz jours[1]." Date and witnesses as in an ordinary charter of feoffment.

Then again the alienee (B) might wish to dispose of his right to C. For this purpose B must execute and deliver a deed like the above, or levy a fine; but C must

[1] Britton, f. 106, b.

complete his ownership by obtaining seisin of the rent. This seisin on C's part required the attornment of the actual tenant of the land from which the rent issued and the receipt from that tenant of something in the name of seisin of the rent. Bracton says that the tenant could not refuse his assent except for substantial reasons. In case, however, the tenant were obdurate and persisted in his refusal then recourse would be had to a fine and the court would compel attornment[1]. We have numerous records of fines of rents and services. Thus in the seventh year of John's reign there was a final concord between Henry of Nordwde and Roger of Bray—in Bedfordshire—"de servitiis Willelmi P. de tenemento quod de ipso Henrico tenet in la Felde et de servitiis Hugonis de la Felde de tenemento quod tenet de ipso Henrico in la Felde. Et de servitiis Roberti filii Matillidae de tenemento quod tenet de ipso Henrico in Sivelestro et de servitiis Osberti Butch de tenemento quod tenet de ipso Henrico in Pollokishello." Fines.

We have laid stress on the fact that for secure ownership of the rent the grantee must obtain seisin, and the model charter from Britton shows how this was done. Bracton also emphasises the importance of seisin. Speaking of the acquisition of incorporeal things in general he points out that they do not admit of delivery[2]. "They are acquired by the view alone of the acceptor or his agent and by the will and affection of possessing," and of these the deed is but evidence. In this way a sort of quasi-seisin is obtained, but Bracton is careful to add that the right so acquired may be readily lost by non-user—"sed nunquam *retinetur* nisi per usum verum." Thus we are brought back to actual seisin either by oneself or one's ancestor as the only safeguard to title. Importance of seisin.

The next incorporeal thing to occupy our attention Advowson.

[1] Compare Britton, f. 106.

[2] "Traditionem non patiuntur," Bracton, f. 222. We may remark however that this is equally true of land—the delivery in both cases must be symbolic.

will be the advowson—the right of presentation to a vacant ecclesiastical benefice. This right must often have been a valuable one, if the value of a thing can be gauged at all by the amount of litigation to which it gives rise.

Advowson appurtenant.

As a rule an advowson was appurtenant to a manor and in the ordinary course was transferred along with that manor. In such a case title to the advowson was the same as title to the manor and so need not delay us here. The only point for remark is that there might be a difficulty over the question of dower. If there had been a specific appointment—definite lands with their appurtenances—then, of course, if an advowson were one of the appurtenances of the dowered land, the widow had the right of presentation. If, however, there had been no such specific appointment, the matter was less simple. For 'reasonable' dower was declared to be one-third part of the husband's lands and tenements *with their appurtenances*. Now these appurtenances might include an advowson, and as this could hardly be divided we should expect some trouble. Bracton says "If satisfaction has not been made to the woman in the matter of the advowson from another source, it seems at first sight that if the church has become vacant three times in her lifetime she ought 'de aequitate' to have the third presentation. But it is of importance for this purpose *how* she has been endowed and how the dower has been appointed originally; and if it has been of the third part and there is only a single manor and one advowson, or if there are three several manors and several advowsons, the wife cannot claim anything of the advowsons by reason of her third part, *unless in the appointment of dower it has been specially agreed that she ought to have something therefrom and it is reasonable*[1]."

Difficulty as to dower.

Advowson in gross.

In many cases, however, the advowson might be conveyed without the manor or vice versa. We then

[1] Bracton, f. 96. Cp. f. 243, "de assisa ultima praesentatione."

have an 'advowson in gross,' as it is now called. Such a right was usually transferred by deed; but this was not actually necessary[1], as a grant by word of mouth in view of the church was sufficient. This gave the grantee the right to the next presentation, but his ownership was not complete until he had obtained actual seisin by exercising his right. Until this was done, he had no power of alienating the advowson[2]; and further he lost all right to presentation if, when the first vacancy occurred, he allowed someone else to usurp his right[3]

Fines.

It need scarcely be said that an 'advowson in gross' could also be transferred by levying a fine. We have numerous records of such transactions, thus:—

"Haec est finalis concordia facta in Curia Domini Regis apud Westmonasterium a die Paschae in unum mensem, anno regni regis Johannis nono, coram ipso Domino rege, Simone de Pateshull, Jacobo de Poterne, Henrico de Ponte Andomeri, Justiciariis, & aliis fidelibus Domini Regis tunc ibi praesentibus, inter Thomam de Preston per Alexandrum Walensem positum loco suo ad lucrandum vel perdendum et Rudulphum Abbatem Westmonasterii deforciantem de advocatione ecclesiae de Perham, unde recognicio ultimae praesentationis summonita fuit inter eos in praefata curia: scilicet quod praedictus Thomas recognovit advocationem praedictae ecclesiae esse jus ipsius abbatis & conventus & ecclesiae S. Petri de West. & eam remisit & quietam clamavit de se et heredibus suis, eidem Abbati & Conventui et eorum successoribus & ecclesiae S. Petri de Westm. imperpetuum. Et praedictus abbas & conventus receperunt eum in singulis beneficiis & orationibus quae fiunt in ecclesia sua de Westm. imperpetuum[4]."

From this it will be seen that title to an advowson was very like that to freehold land. It might be transferred by descent or by gift, and in the latter case a deed or fine was usual and actual seisin of the first importance.

[1] Bracton, f. 222.

[2] "Et quod non habuit ad alium transferre non potuit." Bracton, f. 242, b.

[3] "Nunquam retinetur nisi per usum verum." Bracton, f. 222.

[4] *Form. Ang.* CCCLXIV. p. 220.

Further, there might be dower of an advowson, although this only in exceptional cases, and finally the rule of 'curtesy' applied[1].

Rights of common.

We must turn now to one of the most important of the incorporeal things that come within the scope of our survey—rights of common. When dealing with Anglo-Saxon times we had something to say of the allotment of land in a village community. It was noticed that the arable land was held in severalty and that, appendant to each strip, was a right to turn out a certain number of animals on the common pastures. This no doubt is the most venerable form of the right of common, and it was found practically unaltered in the feudal period now under discussion. One of the most important functions of the manorial court was to decide, by the verdict of a jury of neighbours, the number and kind of cattle that could be turned upon the common pastures from each holding. Thus at the end of the reign of Henry III. the Glastonbury Survey has this record, "Each hide may send to the common eighteen oxen, sixteen cows, one bull, the offspring of the cows of two years, two hundred sheep with four rams, as well as their offspring of one year, four horses and their offspring of one year, twenty swine and their offspring of one year."

Common appendant, appurtenant and in gross.

At a later period rights of common were divided into three distinct groups—common appendant, common appurtenant, and common in gross. 'Common appendant' is the right, described above, of putting a certain number of commonable beasts to pasture on the common fields, the number and kind being fixed by local custom in accordance with the size of the holding. 'Common appurtenant' is also a right that runs with the land; but it is of the nature of a special privilege permitting the tenant to put on the common animals not ordinarily allowed by custom. 'Common in gross' is a personal privilege. It does not pertain to a particular plot of land,

[1] Bracton, f. 243 and f. 245.

but is granted to a definite person. Now the origin of common appendant has given rise to a great deal of learned controversy. To enter into the details of this discussion would occupy more space in this essay than the relative importance of the subject deserves. We shall content ourselves therefore with a brief statement and refer for fuller information to the writings of Williams, Elton, Scrutton and Vinogradoff[1].

Origin of common appendant.

Bracton has a good deal to tell us about rights of common, although what he says is introduced rather casually when dealing with the assise of novel disseisin[2]. However he nowhere makes the triple division described above, and there can be little doubt that the *names* 'common appendant,' 'common appurtenant' and 'common in gross' belong to a later age. It is equally certain that what is now called 'common in gross' was quite familiar to Bracton. He mentions it three times in his discussion, mainly however to deny that it should be described as a 'right of common[3].' That name he prefers to reserve for a right that pertains to a tenement, and he does not distinguish the two forms of this right—appendant and appurtenant. This omission on Bracton's part has led some to conclude that the distinction is due merely to the ingenuity of later lawyers and that both forms of the right have the same origin, being acquired by grant from the lord or by prescription that presupposes such a grant. To say however that both rights are due in theory to grants from the lord is to throw very little light on the difficulty. For such a statement merely draws attention to the well-known feudal principles of the period, in accordance with which land was always held *of* some lord. This feudal theory may have obscured the distinction; but in spite of that we think that there was

[1] Williams, *On Commons* (lectures III.—VII.); Elton, *Laws of Commons*; Scrutton, *Commons, Common Fields* (chap. I.—III.); Vinogradoff, *Villainage in England* (Essay II. ch. 2).

[2] Bracton, f. 222 and f. 234.

[3] Ibid. f. 222; f. 225; f. 228.

a real difference in the ways in which the two rights arose, and that, while common appendant represents the old (pre-conquest) right of common that pertained to each holding of arable land, common appurtenant is less venerable and came by direct grant from the lord or by prescription.

Moreover, although it is true that Bracton does not speak explicitly of this division, there is nothing in his treatment that is opposed to its existence and a good deal that seems to presuppose it. Thus he contrasts 'normal rights' with those claimed by special grant. He says that "some things are excepted *tacitly* and some *expressly*; and they cannot be exacted in virtue of pasturage unless they are *specially* granted[1]." He is careful to explain that a right of pasture cannot be claimed by a tenant holding land reclaimed from the waste, or enclosed from the meadow, except it be by special grant or prescription[2]. In discussing the lord's rights he points out that even he, though legally the owner of the common, is subjected to the customary rules as to pasture, rules that are settled by the tenants. Further we are told that if the lord attempted to sell part of the common, the tenants were entitled to a share of the proceeds. In fact it required a special statute[3] to give the lord power to 'approve' some of the common land, and in so doing he was bound to respect the customary rights of the free tenants[4]. It should be noticed, too, that this very enactment seemed to presuppose the division under dispute, for its operation was confined to those that claimed by customary right[5]; and a special act[6] was needed to give the lord similar powers over those whose title rested on special grant or prescription, such as the 'forinseci tenentes' and the commoners by agreement 'inter vicinum et vicinum[7].'

[1] Bracton, f. 226, b.
[2] Ibid. f. 226 and 228.
[3] Stat. of Merton, A.D. 1236.
[4] Bracton, f. 227, b.
[5] Ibid. f. 228.
[6] Westminster II., A.D. 1285.
[7] Ibid. c. 46.

It seems then that throughout this period there existed a right very similar to that known in later days as 'common appendant.' It adhered to every free tenement in the vill and by its virtue the holder of the tenement could turn a certain number of beasts on the common—the number of beasts, their kind, and the times at which this right could be lawfully exercised being all regulated by custom and settled, in case of dispute, by a jury of the tenants. The right passed with the land, that is to say when *A* enfeoffed *B* of a bovate of land, so much of the right of pasture as pertained to a bovate in that particular village was presumed to be granted with the arable portion. In such a case however Bracton was careful to warn the feoffee that he might lose his right by negligence. He ought to turn his 'quasi-seisin' into an actual one, or he might find himself in the same sad predicament as the man privileged to hang robbers who lost his right by non-user[1].

It must not be supposed however that this was the only way of acquiring a right of common. For a tenant belonging to a different manor might enjoy the right, and again the right itself might be much wider than what the ordinary tenant could claim. In such cases however it must have been acquired either by direct grant from the lord or by prescription. A prescriptive title was constituted by peaceable possession, with continuous, open and undisputed use 'for a long time.' The exact length of time required is not stated by Bracton. He tells us, indeed, that the claimant "ought to show long time and long user—such, for instance, as exceeds the memory of man; for such a time suffices for right, not because right fails, but because an action fails or proof[2]." This, however, is not properly prescription, but a limitation of actions. The cases in Bracton's *Note-Book* throw more light on the problem, for from these we learn that one whose title was challenged in an action "quo jure clamat

Prescription.

[1] Bracton, f. 223; f. 223, b; f. 226, b.
[2] Ibid. f. 230, b.

communam" must, if he relied on long user, be able to allege a continuous seisin *since the Conquest.*

Common 'pro vicinitate.'

Another variant of title was that 'pro vicinitate[1].' It was due to a tacit or specific agreement between neighbours that each would admit the other's cattle to pasture on the uncultivated land between the holdings.

Importance of seisin.

In all these cases it was important to obtain actual seisin of the right, for till then it was precarious. Moreover, just as with an advowson[2], the right could not be alienated before actual seisin had been secured[3]. Alienation was effected by the transfer of the tenements to which the rights pertained, and a view by the grantee or his agent of the lands over which these rights were to be exercised—all this taking place in the presence of neighbours as witnesses. In case the rights were of a peculiar nature requiring the evidence of deeds, then these deeds were handed to the grantee[4].

Common in gross.

So much of commons appendant and appurtenant. A right of common by itself—what would now be called a common in gross—was acquired, if the donor expressed an intention to give and the donee to receive the benefit, by viewing the ground over which the right was to be exercised. In this case it was especially important to obtain actual seisin in order to insure one's ownership and acquire the power of alienation[5]. References to grants of 'common in gross' are often met with in the annals of the period. Here are two from the chronicles of Meaux:—

In the time of the fourth abbot (1197—1210) we read that "Thomas...dedit nobis quicquid pertinet ad tertiam partem trium bovatarum terrae in praescripto West-Kerre de Suttona juxta Forthdyk[6]"; and about the same time "In quo quidem escambio praefatus Johannes dedit nobis

[1] Bracton, f. 222, b; f. 225, b; f. 230.
[2] See p. 61.
[3] Bracton, f. 225.
[4] Ibid. f. 222; f. 223; f. 225; f. 229; and Britton, f. 142.
[5] Ibid. f. 225.
[6] *Chronica Monasterii de Melsa*, I. 300.

in Westmarisco de Suttona pasturam quanta pertinet ad x bovatas et dimidiam terrae in Suttona[1]."

Common of turbary, piscary etc.

Closely resembling these rights of common of pasture were the rights of turbary and piscary and of "cutting or lopping in the forest or wood of another or in other waste places for reasonable estovers for the purpose of building[2]." The relative importance of this subject would scarcely justify us in entering into its details. We shall content ourselves, therefore, with a story from the Meaux Chronicles to illustrate the origin of such rights and the procedure in case of dispute. In the account of the rule of the fifth abbot (1210—1220) we find "atque Johannes de Lasceles dedit nobis unum clausum in Setona, super marram de Wathsand, et piscationem unius sagenae in tota marra de Wathsand et de Hornse[3]." At a later period, under the ninth abbot (1249—1269), this fishing at Hornsey is again referred to. According to the Meaux chronicler the abbot and convent of York have usurped the rights belonging to Meaux, and the monks of the latter monastery decide to contest the matter. They rely on the grant from John de Lasceles mentioned above and on a charter of confirmation given by his descendant William. An elaborate contract is made with William in accordance with which he is, for a consideration, to become principal in the suit they are about to institute against the Abbot of St Mary of York. The case is called and after much altercation a judicial contest ensues. It ends in William Lasceles resigning all claim to the fishing in consideration of an annual charge of two marks to be paid to him and his heirs[4]. This does not seem to satisfy the Abbot and Convent of Meaux and they decide to renew the suit on their own account. Again a great altercation takes place and a judicial duel has to be arranged. The jury proceed to view the mere,

[1] *Chronica Monasterii de Melsa*, I. 311.

[2] Bracton, f. 230.

[3] *Chron. Mon. de Melsa*, I. 369.

[4] This, however, he afterwards conferred on the Meaux people.

and the boundary of the part claimed by the monastery is traced by a man on horseback and marked out by stakes. Then the duel begins and lasts 'from morn to dewy eve,'—"a mane usque ad vesperum"—but the chronicler has to confess that the Meaux champion was getting the worst of it, "athleta nostro paulatim succumbente." At this stage a judge friendly to Meaux intervenes and suggests a compromise, and so, for a consideration, all claim to the piscary is resigned into the hands of the Abbot and Convent of York[1].

Servitudes in general.

As to servitudes in general, Bracton remarks that their number was infinite. "Jura siquidem, quae quis in fundo alieno habere poterit, infinita sunt[2]." As a rule they pertained to a tenement, but they also existed 'in gross' and in either case had their origin in grant or prescription. "Servitudes belong to an estate from a constitution or an imposition of them by the free will of the lord. They may also belong to it without such a constitution by long, continuous and peaceable usage, not interrupted by any impediment contrariwise from sufferance between those present which is taken for consent[3]." Like all incorporeals they were transferred "by the view alone of the acceptor or his agent, and by the will and affection of possession[4]," and as usual actual seisin was a most important safeguard. We shall give a few examples, from the Meaux chronicles, of easements obtained by direct grant, leaving the illustration of title by prescription to the litigation of the period[5].

(A) "Thomas...ductum aquae de Skyrena ad facienda molendina et alia aisimenta nostra ibidem nobis conferebat, pro anima matris suae quae apud nos manet tumulata[6]."

(B) "Fulco de Basset, praepositus Beverlacensis...concessit nobis quod portam et semitam haberemus a grangia nostra de Hayholmo usque Levenam, sicut habuimus tem-

[1] *Chron. Mon. de Melsa*, II. pp. 97—102.
[2] Bracton, f. 221, b.
[3] Ibid. f. 221.
[4] Ibid. f. 222.
[5] See p. 100.
[6] *Chron. Mon. de Melsa*, I. 317.

poribus antecessorum suorum. Et, si ex alia parte domus personae de Levena porta exstructa fuerit, clavem haberemus ad aperiendum nobis et propriae familiae nostrae cum perinde transire necesse haberemus; atque sic viam per mediam villam de Levena usque ad ecclesiam, ac inter ecclesiam et rectoriam per semitam quandam ad hoc assignatam, equitando, pedes eundo, vel equos ducendo, usque in dominicum nostrum de Hayholmo, et e converso, soliti sumus exercere[1]."

(C) "Saierus concessit nobis liberum transitum cum carectis nostris et carris ubique in territorio de Suttona; ita ut liceret nobis bladum nostrum metere, foenum falcare, turbas fodere, et ad libitum nostrum haec omnia cariare[2]."

(D) Robert de Percy laid claim to a certain watercourse —"sed tandem ductum ipsius aquae nobis teneri quietum per chartam renovabat[3]."

The unfree.

So far we have been dealing exclusively with the freehold and its appurtenances and with those rights over land which the free man might exercise. We shall now turn to the unfree and consider some of the interests, akin to those already discussed, that could be held by these people.

In legal theory the lords were owners not only of the goods but even of the bodies of their serfs, and in actual practice they could remove the peasants from their holdings at their will. At all events the evicted ones could make no appeal to the *royal* courts. In fact this was the great dividing mark between the free and the unfree. Glanvill remarks:—"It is to be observed that according to the customs of the kingdom no one is bound to answer in the court of his lord concerning any *free* tenement of his without the writ of our lord the king or of his chief justiciar[4]." Bracton completes the picture by telling us that in case the lord evicted a villein the king would certainly not interfere: "Dominus rex non vult se de eis intromittere[5]." At the same time it would be a mistake

[1] *Chron. Mon. de Melsa*, II. 42.
[2] Ibid. II. 87.
[3] Ibid. II. 147.
[4] Glanvill, XII. 25.
[5] Bracton, *Note-Book*, pl. 1237.

to suppose that the villein was without rights and absolutely unprotected. He could act in every way like a freeman provided his lord permitted him to do so, and although his property was technically his lord's, this did not give anyone but the lord any rights over that property. And even against the lord he sometimes had more than the protection of mere custom. Not uncommonly he had a convention with his lord, and this the latter was bound to respect[1].

Rights of villeins.

As to the rights of those holding in villeinage, they were far from uniform. Even free men could hold in villeinage. They did not lose their status by so doing, and they were distinguished from the ordinary villein by the fact that they were perfectly free to leave the lord and could not be evicted except for failure to perform the services in consideration for which their holdings were granted. However, this right of leaving the land was practically of very little value, and the word 'villanus' was often used quite indiscriminately for free and unfree alike who held in villeinage. But this intermixture of free and unfree is not the only thing that complicates the discussion of the rights of the 'villani.' Even when the free are put aside, some further distinctions are necessary. Thus Bracton draws a line between 'pure' and 'privileged' villeins, the latter being in a sort of middle position between the undoubted freeman and the mere 'tenant at will of the lord.' As time went on these privileged ones were styled 'villeni socmen' to distinguish them from the ordinary villein. Many of them were probably the representatives of those tenants that (before the Conquest) held their land by base services, characterised however by their fixity. Others, again, had been free men before the Conquest, a fact that throws light on the intromixture in privileged villeinage of notions usually associated with freeholds.

Privileged villeins were especially common in those

[1] See Vinogradoff, *Villainage in England*, pp. 70—74.

manors that belonged to the Crown at the time of the Conquest—the 'ancient demesne' as it was called. Thus Bracton[1] says "The tenants of demesnes of the lord the king have such a privilege that they cannot be removed from the soil as long as they are willing and can perform the required service....They do villein service, but it is certain and determined; nor can they be compelled against their will to hold this kind of tenement, and for this reason they are called free." However, although they might be loosely called 'free' to distinguish them from their less fortunate fellows, their position was in many respects a servile one, and Bracton himself insisted that their tenure was really villeinage, although a privileged one. Still it was not true of them as of the ordinary villein that the king would refuse to interfere in disputes concerning their holdings, for, if properly stimulated, he might be induced to issue his 'little writ of right close' and so initiate an action. If this were done the case was heard in the first instance by the manorial and not by the royal court; but the tenant might challenge the judgment and then—though with great difficulty—get the matter removed to the court of the king. In addition to this it should be observed that, if the lord endeavoured to impose additional services on his tenants or otherwise oppress them, the king might, on petition, interfere with his writ of 'monstraverunt.' Such privileges were, as has been said, common on all lands belonging to the 'ancient demesne,' but even there we find instances of pure villeinage, i.e. tenure at the will of the lord. Thus the *Stoneleigh Register* has this entry:—

"Et quod in eodem manerio sunt diverse tenure secundum consuetudinem manerii illius totis temporibus retroactis usitatam, videlicet quidam tenentes ejusdem manerii tenent terras et tenementa sua in sokemanria de feodo et hereditate de qua quidem tenura talis habetur et omni tempore habebatur consuetudo, videlicet quod quando aliquis tenens ejusdem

[1] Bracton, f. 209.

tenure terram suam alicui alienare voluerit, veniet in curiam coram ipso Abbate vel ejus senescallo et per virgam sursum reddat in manum domini terram sic alienandam...Et si aliquis terram aliquam hujusmodi tenure infra manerium predictum per cartam vel sine carta absque licentia dicti Abbatis alienaverit aliter quam per sursum reddicionem in curia in forma predicta, quod terra sic extra curiam alienata domino dicti manerii erit forisfacta in perpetuum. *Dicunt etiam quod quidam sunt tenentes ejusdem manerii ad voluntatem ejusdem abbatis.* Et si quis eorundem tenencium terram sic ad voluntatem tentam alienaverit in feodo, quod liceat dicto Abbati terram illam intrare et illam tamquam sibi forisfactam sibi in perpetuum retinere[1]."

Villeinage ruled by custom.

However, even where the villein held at the will of his lord, customs grew up to regulate that will and check its caprice. And as time rolled on these customs were stereotyped, they began to get inserted in surveys and other documents, until at length they acquired a moral sanction almost as effective as a legal one. In this way hereditary right was established, although the heir had to pay the lord, by relief and heriot, for the privilege of succession. As a rule all the land went to one son, very often to the youngest[2]. Again we find that a widow usually had a right to 'free-bench,' just like the free woman's right to dower, but she had to make a payment to the lord to insure it. The rules as to free-bench were, of course, regulated by custom and so varied in different manors. Usually the widow was restrained from marrying again[3] and was bound to chastity. Occasionally, too, a custom analogous to 'curtesy' existed, but this was far less common than 'free-bench.' Then again a right of common pertained to a villein tenement just as to a freehold, and the arrangement of the common was regulated by custom, in the control of which free and unfree

[1] *Stoneleigh Register*, 32, quoted by Vinogradoff, *Villainage*, p. 116.

[2] In Kent, as is well known, an equal division was made among the sons.

[3] In Kent, however, she was entitled to half the lands of her husband and she did not forfeit this on a second marriage.

shared alike. Indeed the rules as to rights of common afford a striking instance of the thinness of the line dividing the two sections of the community. We even find the lord making contracts about the common in a way that shows how empty might be the phrase that the villein held 'at the will of his lord.' Thus in the records of the manor of Brightwaltham at the end of the thirteenth century we read "To this court came the whole commonalty of the villeins of Brightwaltham and of its mere and spontaneous will surrendered to the lord all the right and claim that the said villeins had heretofore claimed by reason of common in the lord's wood called Hemele and the circumadjacent lands, to the intent that neither the said villeins nor those that hereafter shall hold their tenements shall henceforth be able to *exact, demand* or *have any right* or claim by reason of common in the said wood and circumadjacent lands. And in return for this surrender the lord of his special grace has remised to them the common that he had in the field called Eastfield that lies along the road running from the Red Pit to the lord's wood called Hemele. And he has further remised to them the common that he had in the wood of the said villeins called Trendale, to the intent that the said lord shall have no beasts pasturing in the said common nor in the said wood. And the lord has also granted that, at the time of pannage, so soon as ever the lord shall enter his said wood of Hemele for the purpose of pannaging his pigs, the said villeins also may enter with their pigs until Martinmas and shall give for pannage according to the age of the pigs as is more fully set out in the Register of the Abbey—to wit; for a pig of full age a penny, and for a younger pig, a half-penny[1]."

In addition to title by descent, and the life interests acquired under the customs of 'free-bench' and 'curtesy' already mentioned, a villein tenement might also be obtained by gift or purchase. However, at least in pure

[1] *Select Pleas in Manorial Courts*, vol. i. Selden Soc. vol. II. p. 172.

villeinage, the holding could not be divided and, if disposed of at all, must be transferred as a whole. The universal method of conveyance both in pure and in privileged villeinage was by 'surrender and admittance[1]'; the use of feoffment and charter was confined to freeholds, and any conveyance by these means was of itself enough to convert villeinage into freehold. The symbolic transfer by the rod is referred to in the extract from the *Stoneleigh Register* given above[2]. The rod was handed by the alienor to the lord or his steward and he transferred it to the alienee. It may be remarked that there was nothing essentially servile in this ceremony[3], for we have seen something very like it accompanying the transfer of freeholds in Anglo-Saxon times[4]; and even in the feudal period it was sometimes observed on such occasions. Thus when Alexander of Budiscombe sold his land to Thomas he handed a branch to the lady of the fee, and this she transferred to Thomas in the name of seisin of the land. "Et ipse Alexander se inde demisit et per unum ramum arboris eam terram mihi quietam reddidit in manum, ad saisendum praedictum Thomam de illa; et ego saisivi Thomam inde per eundem ramum arboris—ad tenendum in capite de me et de meis heredibus, sibi et suis heredibus."

Mode of conveyance.

This ceremony was performed in court[5] so as to obtain the witness of the neighbours, whose testimony was employed to decide disputes. In this way the members of the manorial court[6] played a very important part

[1] Cp. extract from *Stoneleigh Register* quoted above, p. 71.

[2] Ibid.

[3] A similar practice was known to Frankish law with reference to freeholds.

[4] Ante, pp. 9 and 22.

[5] A case is recorded in 1301, on the rolls of King's Ripton, in which the ceremony was performed out of court. This, however, was evidently exceptional and was permitted only because the alienor "detentus fuit *gravi infirmitate* quod nullo modo potuit ad curiam domini accedere."

[6] In the present period there was but one court—the halimot—for free and unfree, and the number of freeholders was as a rule relatively small. At a later time a division was made, the Court Baron being reserved for freeholders, the Customary Court for villeins.

in the ceremony of conveyance. Towards the middle of the thirteenth century some of the more prudent of the lords began to keep records of the proceedings in their courts[1]. The original objects of these records had little to do with evidence of title; but it was not long before the advantages of some written evidence became apparent, and tenants made payments to have records of the conveyance of their property entered on the court rolls[2]. In later times this became the most important evidence to title, and the holder was described as tenant 'by copy of court roll.' Perhaps however undue stress has sometimes been laid upon this element of the proceedings. What was really essential was the testimony of the court[3]; the rolls were but a record of the proceedings and so not absolutely indispensable.

[1] The earliest roll extant dates from 1239.

[2] See, e.g., case (L), p. 105.

[3] The cases D, E, H and I cited in the next chapter illustrate the fact that the court was generally described as a 'full' one. See pp. 103, 104, 105.

CHAPTER V.

SECOND PERIOD CONCLUDED. CASES.

THE last two chapters have been taken up with a review of title from the Conquest to Edward I. In the present one we do not intend to add anything new, our aim is simply to illustrate what has already been said by reference to some of the leading cases of the period. The devotion of a whole chapter to these cases needs no apology, since the merest tyro must have learnt to some extent the extreme importance of judiciary law in England. The peculiar weight attached to judicial decisions is doubtless due to the practice that English judges have always adopted of stating publicly the reasons for their decisions and quoting the authorities on which they were based. Be that as it may, we find that even before the Conquest the advocates were often learned in judicial precedents; and at a later date Bracton[1]—himself one of the few private authorities[2]—quoted cases frequently[3] and handed down for our use a large and valuable collection[4].

Importance of case law.

In arranging the cases it will be convenient to follow as nearly as possible the order that has been observed in

[1] *De legibus Angliae*—written about A.D. 1260.

[2] Bracton has been quoted authoritatively in Court within the last few years.

[3] Prof. Maitland says that Bracton mentions 494 cases.

[4] Bracton's *Note-Book* (edited by Prof. Maitland).

the previous discussion. We begin, therefore, with things corporeal and take title by 'gift' first:—

(1) *Abbot Gilbert v. Earl Gilbert and others*, A.D. 1145. In this case a solemn declaration (in writing) by Bishop Bernard is put in as evidence. The Bishop declares that he was present and saw and heard Robert Gernum give to St Peter and to the Abbot of Gloucester and to the monks the church of Wirecesturia of Laverkestoke "et omnia quae ad easdem ecclesias pertinent, et dimidium molendinum, et medietatem terrae quae ad illud pertinet." He affirms also that he knows that King Henry confirmed this gift by a charter, and adds that he saw the queen (Matilda) lead R. G. to the altar of St Peter, and there in the presence of many others R. G. confirmed the gift "per cultellum super altare[1]." Charter of feoffment. Symbolic livery of seisin.

(2) *Gilbert Averell and Amice his wife v. Mathew de Eston*, A.D. 1200. The plaintiffs claim half the towns of Normanton and of Eston as the dower of Amice, formerly the wife of John de Eston. "And John was seised thereof and endowed her thereof and gave her seisin thereof at the church porch by a certain broken knife which she shows[2]." Symbolic livery.

The importance of actual seisin has often been insisted on and numerous illustrations of this are to be found in the reports. Thus:—

(3) *John de Hathfeldia v. Abbot of Warden*, A.D. 1222. This is a dispute as to the ownership of a messuage and forty acres of land and appurtenances at Hathfeldia. John claims as the heir of his uncle William; but the abbot affirms that three days before William's death he gave him the lands and handed over the deeds ["et cartas suas ei tradidit"]. The jury evidently has doubts as to William having been in the full possession of his faculties at the time, and it finds that in any case the Abbot did not have seisin in William's lifetime and so the gift was void. "Et quia obiit in domo et Abbas nullam seisinam Feoffment without livery of seisin is void.

[1] Bigelow, *Placita Anglo-Normannica*, p. 150.

[2] Selden Society, vol. III., *Select Civil Pleas*, pl. 16.

habuit in vita Willelmi, consideratum est quod Johannes recuperavit seisinam suam et Abbas in misericordia."

The annotator remarks in the margin "Nota quod non valet donatio sine seisina ubi donator moritur seisitus[1]."

(4) *Adam of Bedingford v. Robert le Enveisse and others*, A.D. 1230. A free tenement at Codenham is in dispute. Robert is in possession, but Adam declares that his father gave him the land one day after dinner in the presence of the chief lord Gregory and that Gregory thereupon received his homage. However, Adam's father remained in seisin and afterwards gave the land to Robert. It is decided that since Adam never had seisin he has no claim[2].

No claim without seisin.

A similar case.

(5) *Petronilla (wife of William of S. Martin) v. William Rusteng and others*, A.D. 1233. Petronilla claims some land that her husband William gave her on the day of the espousal; but since she had no seisin "nisi post fidem datam" it is decided that the gift was void[3].

There are of course numerous references to charters of feoffment:—

(6) *Thomas de Cammille v. Robert de Sutton*, A.D. 1201. This is a claim for the marsh of Richeresnes which Thomas demands as the heir of his grandfather William Monk, who was seised thereof as of fee and right in the time of Henry I. and took 'esplees' thereof, as in cheese, wool, rushes and other esplees, to the value of 5*s*. Robert however produces a charter of Robert de Leyburn which sets forth that R. L. gave him (R. de Sutton) that marsh, and he vouches to warranty the son of the feoffor. A day is fixed for the case[4].

Charter of feoffment.

(7) *William Marshal v. Fawkes of Breauté*, A.D. 1220. This is a furious dispute between two great men as to the ownership of a large tract of land. Some of it Fawkes

[1] Bracton's *Note-Book*, pl. 144.
[2] Ibid. pl. 428.
[3] Ibid. pl. 777.
[4] Selden Soc., vol. III. *Select Civil Pleas*, pl. 80.

declares to have been granted to him by deed under seal. The genuineness of the seal is disputed; but Fawkes offers to prove it either by battle ("per corpus cujusdam liberi hominis"), or by the evidence of neighbours, or by comparison of seals. Marshal seems anxious for a fray and he offers the king a thousand marks for the privilege of fighting Fawkes. "Offert defendere per corpus suum versus ipsum Falkesium sicut curia considerarit, et offert domino Regi mille marcas pro habenda defensione sua versus eum per corpus suum[1]." Disputed charter.

(8) *Galfrid Esturney v. Osbert of Abbelot*, A.D. 1227. This is a claim for the manor of Russve with its appurtenances. Galfrid claims by assise of mort d'ancestor. Osbert vouches Reginald to warranty, and says that Reginald gave the property to Osbert's brother Alexander "habendum et tenendum eidem Alexandro et heredibus suis," according to a charter that Osbert produces. Reginald however puts in another document that shows that he gave the manor to Alexander for life and to the heirs of his body by his then wife. To settle the matter four witnesses and eight "recognitores" are summoned. The witnesses are put upon oath and say that they were present when Reginald made his charter and that the gift was a conditional one; but of the other charter—that put in by Osbert—they know nothing, nor of the gift. The recognitors say that they know nothing of *either* charter; but they saw Reginald receive the homage of Alexander "in pleno comitatu" of that land and he placed him in seisin; but they neither saw nor heard of a charter. And since the witnesses know nothing of the second charter, nor the jury upon whom Osbert placed himself, and since it is testified that Alexander was a comrade of Reginald and carried his seal at the time the deed was made [thus raising a presumption of forgery], and since Osbert has failed to prove the genuineness of his deed—the case goes against him and his deed is cancelled[2]. Genuineness of deed disputed.

[1] Bracton's *Note-Book*, pl. 102.

[2] Ibid. pl. 250.

Claim by descent.

(9) *Sir Randolf of Cestria and Lincoln v. Prior of S. Mary de Pré*, A.D. 1228. Randolf claims land in Stivington by descent from his grandfather who, he says, was seised in his demesne as of fee and right in the time of Henry and took esplees to the value of 20*s*. He offers the king xx marks[1] to have the case tried, and if this is acceptable he will prove the matter by the body of one of his freemen. The Prior sets up this claim:—He

Counter claim by charter.

produces a charter of Henry I. which grants and confirms to God and the church of St Mary de Pré several lands in Normandy, and proceeds thus, "et ex dono meo manerium in Normannia quod vocatur Bures et Estvington in Anglia cum omnibus ei pertinentibus et cum omnibus libertatibus suis. Has tenuras et omnes alias tenuras suas quecunque fuerint et de quibuscunque habeant, volo et firmiter precipio quod ita teneant bene et in pace etc., sicut ecclesia in regno meo potest liberius tenere et insuper sicut mea propria." He produces also letters patent of King Henry with these words "Henricus Rex Angliae vicecomiti Berck' et ministris suis salutem. Precipio quod monachi S. Marie de Prato teneant manerium suum de Stivendum ita bene et in pace et quieta cum socca etc. sicut eis illud dedi in elemosinam et sicut habui illud in manu mea." Further he produces a charter of Henry II. confirming all these gifts in perpetual alms; again a charter of John confirming the gift of his grandfather Henry, and finally one of Henry III. also confirming that gift. Sir Randolf however insists that his grandfather was seised as described above in the time of Henry II.; but the Prior replies that the monks were in continuous seisin from a much earlier time than the knight claims for his ancestor. Sir Randolf thereupon offers to prove his case by the body of one of his freemen; and if that is not acceptable he will give the king

[1] In passing, note this offer of money to the king for justice. The king had a strong interest in seeing that 'justice' was done: but 'nothing for nothing' was the rule. Cf. case (23), p. 87, below.

xxx marks[1] to have the matter decided. The Prior sticks to his deeds and protests that the knight produces no proof of his statements. A day is fixed for hearing the case[2]."

We have spoken at length of the final concord as a mode of conveyance[3]; and we hear a good deal of this in the reported cases. Thus:—

References to fines

(10) *Richard de Throngham v. Robert Archard*, A.D. 1201. This is a claim "for the forinsec service for a virgate of land that remained to Robert by the chirograph made between Richard's father and Robert touching half a hide of land about which there was a plea between them in the king's court[4]."

(11) *John Bishop v. Augustine*, A.D. 1202. "John Bishop, parson of the church of Backwell, complains that Augustine the chaplain made a fine with William his nephew, without John's consent, touching half a virgate and half a furlong of land with appurtenances in Backwell, about which land a chirograph had (previously) been made between John and Augustine, in which it was contained that Augustine had admitted the said land with the appurtenances to be the right of John's church of Backwell and that Augustine should hold all that land for his life and that it should afterwards go back quit to the said church and that John would warrant the land to Augustine against John le Sore. Augustine came and admitted the fine and the chirograph made as John says, and he says that his nephew William brought a certain assize against him touching the land and that, before other Justices, he admitted the land to be the right of William, because John (the plaintiff) would not warrant the land to him. Augustine, being asked if he ever vouched the said John to warranty, replies that he did. It is decided that because Augustine and William have

[1] He is outbidding the Prior.
[2] Bracton, *Note-Book*, pl. 272.
[3] p. 38, et seq.
[4] Selden Soc., vol. III. pl. 77.

deceived the court of our lord the king, and behind John's back, they and their heirs shall lose that land for ever and John and his church may have seisin thereof and may hold it in peace etc.[1]"

(12) *Roger of Calceto and others v. Albreda of Jarpenville*, A.D. 1229. This claim for land is opposed on the ground that the ownership has been the subject of an earlier suit [which lasted *six years*]. The ancestors of the present claimant did not oppose the claim on that occasion and the decision of the court is produced in the present case ("per cyrographum quod profert et quod testatur etc.")[2].

(13) *Walter, son of Alan, v. Richard de la Huse*, A.D. 1222. Walter claims by descent from Almarus who was seised etc. in the time of Henry II. Richard replies that his father John de la Huse obtained the land "*per finem duelli*," the battle having been fought in the presence of the demandant Walter and of his elder brother William—and they set up no opposing claim at the time of battle. Walter cannot deny this and so loses his case[3]."

Titles by descent.

Examples of title by descent are of very frequent occurrence and we shall content ourselves with a few typical instances. It should be remembered that the ancestor from whom descent is traced must have been seised in his demesne as of fee and right and have taken esplees. Also that this must not have happened too far back, as there was a limitation of actions.

(14) *Gilbert Good v. Simon, son of Elias*, A.D. 1202. Gilbert Good demands against Simon, son of Elias, three virgates of land with appurtenances by descent from his great-grandfather Gilbert and traces his descent in accordance with the accompanying scheme. Gilbert (the elder) was seised in

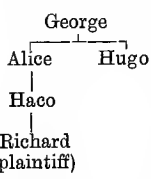
Gilbert
|
Alfred
|
Richard
|
Gilbert
(the demandant)

[1] Selden Soc., vol. III. pl. 176.
[2] Bracton's *Note-Book*, pl. 302.
[3] Ibid. pl. 147.

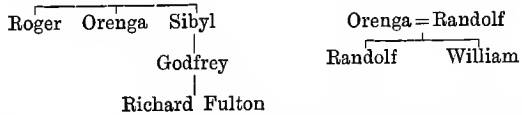
his demesne as of fee and right on the year and day on which Henry the grandfather of the king's father [i.e. Henry I.] died and he took esplees to the value of 5*s.* 4*d.* and more. All this he offers to prove by a certain freeman of his, Ralph the Forester, who is ready to prove this as of the view and by the command of his father Robert, etc.[1]"

(15) *Noel v. de Cornhulla*, A.D. 1219. Noel claims that certain land is his as of right and fee, that it descended to him as the heir of his brother to whom it was granted by a deed that he produces—a charter of King Richard. He says that he was seised as of fee and right and took esplees etc. in the time of King John. He had been thrown into prison and temporarily disseised and meanwhile Cornhulla had taken possession. The parties go to a jury on the issue of fact[2].

(16) *Richard of Cattona v. Odo of Daunmartin*, A.D. 1222. Odo has warranted some lands and the plaintiff claims that the warranty is bad (injuste warrantizavit) as he (Richard) is the real owner. He claims as the heir of Hugo who was seised in his demesne as of fee and right and took esplees etc. in the time of Henry II. He traces his descent as shown in the scheme and offers to prove his claim by the body of Ado who affirms that his father saw Hugo take esplees from the land[3].



(17) *Richard Fulton v. Cecilia of Ebreicis*, A.D. 1224.



Richard Fulton puts in a claim to two pieces of land—two knights' fees that he claims as the heir of Roger who

[1] Selden Soc., vol. III. pl. 250.
[2] Bracton's *Note-Book*, pl. 17.
[3] Ibid. pl. 185.

was seised in his demesne as of fee and right in the time of Henry II. and took esplees to the value of 20*s.* As to one of these fees, Cecilia pleads that she has not the whole fee (someone else has a share) and in this she is successful. As to the other, she claims that Orenga did not die without issue—as Richard said—but was married to Randolph and had issue. Richard tries to meet this by affirming that there was no marriage and that the children (Randolph and William) are consequently illegitimate. To prove their legitimacy Cecilia appeals to the judgment of the court in a previous case in which it had been decided that William was entitled to certain lands by *descent* from his mother Orenga. This refutes Richard's statement as to the marriage and so Cecilia wins the case[1].

[Jus tertii.] [Here we have what looks very like the setting up of a jus tertii to be urged by way of defence..." Thus our law of the 13th century seems to recognise in its practical working the relativity of ownership. One story is good until another is told. One ownership is valid until an older is proved. No one is ever called upon to demonstrate an ownership good against all men; he does enough even in a proprietary action if he proves an older right than that of the person whom he attacks[2]."]

(18) *Richard of Mundeville v. John of Mundeville*, A.D. **1224**. Richard claims land against John as the heir of his grandfather Nigel. John admits the seisin of Nigel and says that his elder brother Ranulf died before Nigel and that he (John) remained in possession and kept the land as Nigel's heir[3].

Nigel
Ranulf John
Richard

This case is a further illustration of the importance of actual seisin. Prof. Maitland in a note to Bracton puts the matter thus:—"A has two sons B and C of whom B is the elder: B dies leaving a son D. A dies. C is

[1] Bracton's *Note-Book*, pl. 227.
[2] Pollock and Maitland, *History of English Law*, II. 76.
[3] Bracton's *Note-Book*, pl. 230.

in possession. D has the better right but no remedy. Bracton regards this as due to the *casus Regis*—John having excluded Arthur of Brittany [f. 267 b]; but cf. Glanvill, VII. 3."

Occasionally we come across references to escheat in the cases of the period. Thus:—

(19) *Illiethon daughter of Reinward v. Hamo*, A.D. 1201. "The assise comes to recognise if Reinward, the father of Illiethon, wife of Richard, was seised in his demesne as of fee of one acre of land with the appurtenances in Hendra on the day that he died etc.; which land Hamo de Hendra holds. [Hamo] comes and says that [Illiethon] has no right in the land and ought not to have any, because Reinward who formerly held that land fled the country on account of his crimes, so that he was outlawed by the assise of the kingdom in full county (-court); and afterwards during the outlawry he was slain by his enemies with an arrow and died an outlaw. And Richard and his wife say that [Reinward] never was outlawed, but in truth he alienated himself from the country on account of his enemies; and at length came to Earl Reginald (who at that time had the county of Cornwall and all things that appertain to the king, as well concerning life and limb as other things) and he afterwards came into the peace and was reconciled to him. And afterwards [Richard and Illiethon] admitted that Reinward was outlawed; but Earl Reginald pardoned his outlawry and he then recovered seisin of all the lands that he had lost on the aforesaid occasion and in such seisin he died, being slain by his enemies with an arrow. And the whole county testifies that after Earl Reginald had pardoned the outlawry, Reinward was again outlawed for his crimes and while an outlaw was afterwards slain. And be it known that Reinward held no land of the said Earl Reginald, but of the Priory of Bodmin; wherefore it would seem that, although the Earl could pardon [Reinward] the outlawry, he could not give back to him the land, which was so escheated to another. It is Escheat.

considered that [Illiethon] has no right in the land and that she takes nothing by that assise[1]."

This escheat arose from outlawry. Still more common are escheats from failure of heirs.

(20) *Randolph le Moyngne v. Walter son of Hugo*, A.D. 1230. This is a claim for two virgates of land and their appurtenances which Galfrid le Moyne Byscoyne held of Randolph. Randolph affirms that Walter "non habet ingressum nisi per praedictum Galfridum" and that the lands ought therefore to revert to him as escheat, for Galfrid was a bastard and died without heirs[2].

The next subject for illustration is dower, and to this we find frequent references.

Dower.

(21) *Wife of Robert v. Abbot of Abingdon, circa* A.D. 1154. Robert had given half a hide to the Abbey—confirming the gift "super magnum altare, absque omni in posterum reclamatione." However, the wife claims that this was given to her as dower; but she loses her case[3].

(22) *Eustace de Vesci v. Geoffrey de Saumarez and his wife*, A.D. 1200. "Eustace de Vesci demands against Geoffrey de Saumarez and Matilda his wife, as his right and inheritance, the town of Rodenham of which Eustace Richard's son was seised in the time of king Henry. Geoffrey comes and says that he claims nothing in that land except through Matilda his wife, whose dower that land is, of the gift of one William de Tilli, formerly her husband, whose heir is one Ralph de Tilli, brother of the said William, and he is beyond the sea. Geoffrey vouches Ralph to warranty. Let them have him at Westminster on the morrow of S. Clement. Matilda puts in her place her husband or Jordan de Brakebury, and if Geoffrey cannot be present, she puts Jordan in her place[4]."

[1] Selden Soc., vol. III. pl. 188.
[2] Bracton's *Note-Book*, pl. 402.
[3] Bigelow, *Placita Anglo-Normannica*, p. 180.
[4] Selden Soc., vol. III. pl. 43.

(23) *Robert de Orston v. Petronella de Orston,* A D. 1201. "Robert de Orston complains that Petronella de Orston has intruded herself into his capital messuage in Orston, that he holds in fee farm, because he offered her one of the messuages that he holds of the king in capite. Petronella against this says that he offered her neither of these messuages; but she says that she brought a writ of the Justices to the sheriff in which it was contained that he should assign reasonable dower to her, so that by the command to the sheriff and by the view of lawful knights of the county, [the sheriff] assigned to her her dower and gave her that messuage; and thereof she puts herself on Sir Hugh Bardolf and upon the jury of twelve lawful knights of the country; and for having the jury and their testimony, she offers the king one mark[1]. Robert puts in his place William de Orston, etc. He defends that that messuage was never assigned to her and thereof puts himself upon Hugh Bardolf because he was not there as justice, but as sheriff. Hugh Bardolf is commanded that on the quindeme of S. Hilary by lawful men who are said to have been present when Petronella so recovered her dower, he shall make known the truth of the matter to the Justices, etc.[2]"

(24) *Adam Read v. Warin,* A.D. 1202. "The assise of mort d'ancestor between Adam Read and Amabel his wife, and Warin son of Warin, touching one carucate of land with appurtenances in Sutton, remains because Warin says that he holds only a quarter of that land and his mother holds *half* of it in dower, and his brother holds the other quarter. Therefore let Adam and Amabel seek other writs, etc.[3]"

[N. B. This is in Kent and illustrates the local custom of dower (a moiety to the widow) and descent (equal shares to the sons).]

[1] Cf. p. 80.
[2] Selden Soc., vol. III. pl. 110.
[3] Ibid. pl. 128.

(25) *Ala de Scalariis v. Henry de Scalariis,* A.D. 1218. Ala claims that on the day of her espousal with Hugo the father of Henry de Scalariis, Hugo endowed her (with the consent of his father) with the manor of Waddon and its appurtenances in the county of Cambridge as a third part of all his inheritance, and that if this were not sufficient for a third share the dower was to be made up from the rest of Hugo's inheritance. The jury confirm this and a writ is issued to the sheriff at Norfolk to make a valuation of all the lands that Henry and Ala de Scalariis hold "tam in dominicis quam in serviciis redditibus villenagiis, in bosco et plano et in omnibus rebus ad terras illas pertinentibus, et pretium omnium terrarum illarum sic appreciatarum scire faciat et evidenter et distincte per literas, etc. et per quatuor discretos homines ex illis qui appreciacioni illi interfuerunt, etc.[1]"

(26) *Theobald de Lasceles and his wife Ada v. William de Cantelupo,* A.D. 1220. The demandants claim seven carucates of land and its appurtenances as the dower of Ada from her former husband. William however objects that Ada ought not to have this as dower for the land is the head of a barony and so cannot be included in a general claim for dower. He declares himself willing to let her have "reasonable dower according to the law of the land." Theobald and Ada reply that the manor is not the head of a barony but is a knight's fee all by itself; and further that Reginald, the son of Ursus, William's ancestor, endowed his wife Beatrice with the same manor and that she held it as such all her life after Reginald's death. Further they declare that Ada was endowed specifically (nominatim) with that manor[2]."

Again, we meet with several cases of tenants by curtesy. Thus:—

Curtesy.

(27) *Hugo de Mariscis v. William de Mariscis,* A.D. 1228. The demandant claims the custody of William the son of the defendant and of Agnes who held land of

[1] Bracton's *Note-Book*, pl. 4. [2] Ibid. pl. 96.

him by military service. William maintains however that Hugo ought not to have the custody of the boy, for William (the boy in question) is his son and heir "de predicta Agnete genitus" and he is holding the land by the custom of the kingdom, since he had a son by Agnes who is heir to the said land—"per consuetudinem regni, quia puerum habuit de Agnete, cujus hereditas terra illa fuit[1]."

(28) *Robert of Norfolk v. Adam, abbot of Eynesham and others,* A.D. 1228. Robert affirms that he has been unjustly disseised of a certain tenement. The Abbot however maintains that he took possession of it on the death of Robert's wife Agnes and is holding it until the right heir comes and does as he ought. Robert afterwards appears at Westminster with some sons that he has by his wife Agnes and maintains that he should hold the land during his life "secundum legem et consuetudinem regni." To this the Abbot replies that Robert did not marry Agnes until after the boys were born, in fact only three months before the death of Agnes, and he is ready to prove that the marriage was made at Fendrayton etc. Robert answers that, as a matter of fact, he married Agnes 'apud Sanctum Juonem' twelve years ago, but that the marriage was private as he was afraid of a solemn ceremony on account of his relations and the lord he then served. However, after the boys were born, he came to Fendrayton and there, acting on the advice of his friends, he married Agnes with due solemnity "in facie ecclesiae" as the sponsors well know. The Abbot however points out that three years ago Agnes sued him and that on that occasion Robert appeared with her "sicut armiger" but made no mention "in breve nec in placito" that he was her husband. Robert is unable to deny this as it is borne out by the records of the court, and so he loses his case[2].

[1] Bracton's *Note-Book*, pl. 267.
[2] Ibid. pl. 291.

(29) *Johanna de Bosco v. Randolph de Bray*, A.D. 1231.

William de Bosco = Alicia = Randolph de Bray
| |
Johanna [son]
de Bosco

This is a case where the wife has married again and the second husband claims 'by curtesy.' Alicia first married William de Bosco and had a daughter Johanna by that marriage. She afterwards married Randolph de Bray and had a son. Now Johanna claims a carucate of land and its appurtenances against Randolph de Bray. She affirms that the land was given "in maritagium" to William de Bosco and Alicia and the heirs of their bodies and that therefore it is hers by right.

Randolph however maintains that the land "sive fuerit maritagium sive hereditas ipsius Aliciae" ought to be his for his life "according to the law and custom of the realm." Moreover he denies that it was given to the heirs of the bodies of William and Alicia, but simply to their heirs[1].

There is a comment by the annotator "quod maritagium remanere debet viro per legem Anglie sicut ipsa hereditas, si data fuerit viro et uxori et heredibus ipsius uxoris, sive heredes fuerint propinqui vel remoti, si autem ipsis et heredibus de ipsis viro et uxore exeuntibus tunc secundus vir vel tertius vel quartus nihil capient per legem Anglie, quia pueri sui heredes esse non poterunt nec propinqui nec remoti set sunt omnino extranei." "The doctrine of the marginal note," says Prof. Maitland, "is just Bracton's ff. 437 b, 438. The second husband has curtesy not only of the wife's inheritance but also of her maritagium, if there is no special limitation to the heirs of the first marriage. This is so whether any heirs of the first marriage are alive or no. But the point was disputable. Segrave held that the second husband has no curtesy, if there is issue of the first marriage, to take the maritagium. Seemingly both Bracton and the annotator thought otherwise. If however

[1] Bracton's *Note-Book*, pl. 487.

there is special limitation, then the husband is not entitled for the children of the second marriage."

These cases will suffice to illustrate the law as to corporeals. We must turn now to things incorporeal and should recall the fact that franchises always spring from royal grant, at least in theory, although later a prescriptive title is the most common one. Incorporeals.

(30) *Bishop Wulfstan v. Abbot Walter, circa* A.D. 1077. Wulfstan claims the right to "socan et sepulturam et requisitiones et omnes consuetudines faciendas ecclesiae Wigorniensi in hundredo de Oswaldeslawe et geldum regis et servitium et expeditiones in terra et in mari de XV hidis de Hantona et de IIII hidis de Benningewrde, quas debebat abbas tenere de episcopo sicut alii feudati ecclesiae ad omne debitum servitium regis et episcopi libere tenent." The king's writ directs that the matter be decided upon the right of the parties "sicut erant die, qua novissime, tempore regis Edwardii, geldum acceptum fuit ad navigium faciendum." Wulfstan calls witnesses that had seen and performed the services in the time of Edward the Confessor[1]. Long possession.

(31) *Burgesses of Northampton v. Abbot of Thorney,* A.D. 1201. "The Burgesses of Northampton complain that the Abbot of Thorney unjustly took from them toll and unjust customs in his fair of Woodston and of Yaxley and contrary to the charter of our lord King John, which they have and proffer, in which it is contained that he has granted to them that they be quit of all toll throughout all England, and if anyone shall take [toll] from them, and shall fail to do right, the reeve of Northampton may make distress [from him] at Northampton. And Thomas de Huntingdon, put in the place of the Abbot, comes and says that of old of the gift of King William the Conqueror they had a market at Yaxley with toll and other free customs, and he produces charters of King Henry the grandfather and King Henry the father so confirming. Royal grant.

[1] Bigelow, *Placita Anglo-Normannica*, p. 17.

And against this the Burgesses say that the Abbot unjustly took custom of the men of Northampton at Woodston, and moreover they say that of old at Yaxley [the Abbot] was accustomed to take for each cart one penny, for each load and horse one halfpenny, and for the load of a man one farthing, and that now he had doubled the customs. And against this Thomas says that in the time of King Henry, the father, they took for carts as aforesaid twopence and for the load of a horse one penny and for the load of a man one halfpenny, and thereof he puts himself upon lawful men of the neighbourhood; and that on the petition of the men of Northampton and by reason of his market at Yaxley he took the customs due at Woodston, he in the same way puts himself thereof on a jury of the county, since they could load and unload better at Woodston than at Yaxley. They [the Burgesses] defend that never by their will have they come to Woodston and they offer to deraign by Bartholomew Kempe or Thomas that unjustly etc. And since the Abbot says nothing why he ought to take customs at Woodston, nor has he a charter thereof, it is considered that the Abbot is in mercy for the unjust taking of customs; and because the Abbot says that in the time of King Henry the father he took customs, to wit two pence for a cart and one penny for a horse, and one halfpenny for a man, and [the burgesses] cannot contradict this, let the Abbot hold in peace [the right given by his charters][1]."

(32) *R. v. Bishop of Norwich*, A.D. 1230. The Bishop of Norwich claimed throughout his liberty all amercements of his men holding in fee, amercements both in the county courts and in the eyre of justices. "Et dominus Rex quaesivit quo warranto petiit amerciamenta illa." He claims under charters of the King's ancestors, viz.:—a charter of King John which he produces. Moreover he declares that Bishop J. de Gray his predecessor was seised of these amercements and Bishop Randolph also[2].

Royal grant.

[1] Selden Soc., vol. III. pl. 27.

[2] Bracton's *Note-Book*, pl. 391.

We have laid stress on the importance of seisin in all such cases. In pl. 145 (Bracton's *Note-Book*) the burgesses of Beverley oppose a claim for taxation on the part of the citizens of Lincoln on the ground that although Lincoln may have had a royal charter giving them powers of taxing—as the Lincoln people assert—yet the people of Beverley have never paid any such tax. There are many similar cases. Import-ance of seisin.

Turning from franchises to advowsons, we find that these give rise to almost endless litigation.

(33) *Abbot of Battel v. Alan de Bellafago* (temp. Hen. II.). Alan claims the right to present to the church at Mendlesham, relying on a (somewhat doubtful) charter of the Abbot of St Martin. The suit is compromised by Alan renouncing his claims in return for a grant of the church at Brantham to hold of the Abbey for an annual payment of one pound. Alan resigns his charters to the Abbot[1]. Advowson. Charter.

(34) *Geoffrey de Buckley and the Dean of Lincoln v. the Prior of Dunstaple,* A.D. 1200. This is a claim for the advowson of a church of S. Mary of Bedford as a right belonging to the church of Lincoln. The demandants show a charter of King William that testifies that [William] gave the church of S. Mary to that of Lincoln; and they show a confirmation of King Henry. The Prior has other charters that tell a different tale, and a day is fixed to hear judgment[2]. Royal grant and confirma-tion.

(35) *Robert de Turnham v. Abbot of York,* A.D. 1200. Robert claims the advowson of the church of Doncaster by virtue of descent to his wife from her great-grandfather who "was seised in the time of King Henry the grandfather as of right, and which Robert pledged the whole of the town of Doncaster, with the advowson of the said church, to the said King Henry for five hundred marks of silver; and this the said Robert de Turnham repaid to our lord the King as he says; [and the King] gave him Title by descent.

[1] Bigelow, *Placita Anglo-Normannica*, p. 245.

[2] Selden Soc., vol. III. pl. 35.

back the town of Doncaster with all the appurtenances, as the right of his wife. Wherefore he demands against the Abbot that church and his seisin thereof as Robert Fossard (his predecessor) had it on the day that he pledged the town of Doncaster as aforesaid. The Abbot comes and defends [Robert de Turnham's] right and says that the church of York possessed that church and had it from the Conquest of England as the gift of Nigel Fossard father of the said Robert, and he shows Nigel's charter testifying that Nigel gave that [church] to the Abbey of York in pure and perpetual alms; and he shows a confirmation of William Fossard, son of the aforesaid Robert, who confirms the gift that Nigel his grandfather made to the said church. Further the Abbot says that he has charters of King Henry, grandfather (sic) of our lord the King, and of all the Kings of England, confirming the gift of Nigel and William from the time of the said King Henry.... Be it noted that Robert [de Turnham] produced his suit and prayed a recognition of the neighbourhood whether the said Robert [Fossard] was so seised of the said church as aforesaid or not; and the Abbot says that he will not put himself on a jury touching so ancient a time[1]."

Charter of feoffment.

In these cases title is by charter. The right could, as we have seen, be transferred by quit-claim and fine :—

(36) *Prior of the Hospital of St John of Jerusalem v. Allreda de Lisures*, A.D. 1200. "A day is fixed for the receipt of their chirograph touching the church of Flawforth, whereof they made a concord to this effect—that the Prior remised to Allreda and to William her son the claim that he had to that church and she gave and granted to the Prior and the house of the Hospital seven shillings rent in...to hold for ever in pure and perpetual alms; so nevertheless that the Prior may have his recovery thereof against the heir of John [Constable] of Chester, who gave that church by his charter to the house of the Hospital[2]."

Fine.

[1] Selden Soc., pl. 41. [2] Ibid. pl. 55.

(37) *Abbot of Evesham v. Alice de Gray*, A.D. 1200. Quit claim.
"William Moor, put in the place of the Abbot of Evesham, comes and for the Abbot and his successors quit-claims to Alice de Gray and her heirs for ever all the right and claim that [the Abbot] had in the church of Cornwell —save the ancient and due tribute that the Abbot and his predecessors were accustomed to take, to wit, one pound of wax, as William and Alice admitted[1]."

The importance of actual seisin is brought out in numberless cases:— Importance of seisin.

(38) *Ralph Basset v. Abbot of Rochester*, A.D. 1201. "The Abbot comes and says that the church of Woodford [the advowson to which is in dispute] is not vacant, because his church [of Rochester] has had it and possessed it for thirty years and more as the gift of Osmund Basset and William Basset. And the Abbot shows their charters; one of which testifies that Osmund Basset gave the church [of Woodford] to the church of Rochester in pure [and perpetual alms]; and the other testifies that William conceded it to them as Osmund's gift. So that Richard de Backton who last died was perpetual vicar of that church [Woodford], rendering to the Abbot's church two marks yearly. And against this Ralph says that he, after the obtaining of the said charters, presented the said Richard to that church, and thereof he puts himself upon the jury. The jury says that Ralph presented the last parson; let him have a writ to the bishop to admit his clerk[2]."

(39) *Abbot of Lessay v. Abbot of Peterborough*, A.D. 1202. This is a claim to the advowson of the church of Sudbrook on the ground that the church of Lessay has been seised of this for sixty years and more as the gift of Robert de Hay whose charter is produced. Several charters of confirmation are also forthcoming. The Abbot of Peterborough opposes, but it is considered that nothing has been said on which any deraignment may be made— and so "*qui tenet teneat*[3]."

[1] Selden Soc., pl. 67. [2] Ibid. pl. 70. [3] Ibid. pl. 245.

No alienation before seisin.

Moreover the donee of an advowson cannot alienate until he has obtained actual seisin:—

(40) *Herbert de Aleneun v. Nicholaus Walensis, Willelmus le Eyr, and Robert his son,* A.D. 1231. Herbert says that Roger Walensis presented a certain Randolph to the church and after his death he (Roger) gave and quit-claimed all his right to a certain Simon de Saham and Simon's son Robert gave it to Herbert by charter. Robert, son of Isabella, appears and admits that Roger made the last presentation, as said above, and that Roger afterwards gave the whole advowson to Isabella his mother by a deed that is produced. "And because it is contained in the deed (that Herbert produces) that Robert gave and granted his whole right and Robert never had seisin, as Herbert knows, it is considered that Herbert can have no claim to the advowson[1]."

Seisin must be of the claimant or his ancestor.

We may notice that the demandant must declare on his own seisin or that of his ancestor and not on that of a donor. Thus:—

(41) *Peter de Danes v. Prioress of Etona,* A.D. 1231. This is a claim for the advowson of the chapel of St Peter of Allestorpe as the demandant's right "since a certain Hugo Wae was seised in his demesne as of fee and right in the time of King Henry the grandfather of our lord the king and presented a certain Herbert la Ponere to the church, and he was admitted to his presentation and took esplees in tithes and otherwise to the value etc.; and the same Hugo afterwards gave the land of Allestorpe to Thomas de Danes, Peter's father, with the advowson of the aforesaid chapel and with all its appurtenances and from Thomas the right of presentation descended to Peter as his son and heir. That Hugo [was so seised] and that such is his right, he offers to prove etc....The Prioress appears by attorney and objects that neither Thomas nor any of his ancestors was seised of the advowson." This Peter is unable to deny and so loses his case[2].

[1] Bracton's *Note-Book*, pl. 644.

[2] Ibid. pl. 488. Cp. Bracton, f. 376.

As to dower of an advowson, we have seen[1] that unless the advowson was specifically named in the dower, or was appurtenant to land specifically named, the widow could not, as a rule, insist on a share in the presentation.

This is illustrated by an extract from a case quoted by Bracton, f. 243 b:—

Dower of an advowson.

(42) "And Maria de Valoinis claimed a third part of a certain advowson by reason of a tenement that she held in a certain vill in the name of dower, and because she would not consent "in clericum presentatum ad duas partes illius ecclesiae nec advocacio illa prius fuit divisa consideratum est quod possessor duarum parcium recuperavit advocacionem suam et presentationem suam ad totam ecclesiam[2]."

(43) *Emma de Bella Fago v. William of Verdun and his wife*, A.D. 1227. The knight opposes this claim to the advowson on the ground that Emma has no land in the vill except a third portion of property of which he and some others have the remainder. He says that it is well known that Gilbert of Norfolk, Emma's late husband, made the last presentation. Emma is asked if she was specifically ('nominatim') endowed with the advowson and of the part of the land that she holds as dower. She answers that she does not know, but says that the church is situated on the land that she holds as dower. Since, however, she is not able to say that she was specifically endowed with the advowson her dower is limited to a third part of the manor—exclusive of the advowson—and so she loses her case[3].

Here is a case showing that there could be 'curtesy' of an advowson:—

Curtesy of an advowson.

(44) *Richard de Desebing v. Prior of the Hospital of Jerusalem in England*, A.D. 1229. "The jury say that a certain Roger Constantine presented one Thomas who was the last parson to die in that church and who had been admitted to his presentation. Asked who is Roger's

[1] Ante, p. 60.

[2] Bracton's *Note-Book*, pl. 380 [A.D. 1230].

[3] Ibid. pl. 261.

heir, they say that Roger had one son William by name, and William had a son Roger and a daughter Amicia, that Roger died without issue and the heritage descended to his sister Amicia who was the wife of Richard de Deneburgo, who had sons by her... And because Richard has the heritage of his wife and her heirs according to the custom of the kingdom it is considered that Richard should regain seisin of the advowson, and so the Prior loses[1].

Commons. The cases on the subject of commons are very numerous. We shall be content with a few typical ones.

(45) *Nicholas de Estuteville v. Abbot of S. Mary of York*, A.D. 1227. This is a dispute about a common of wood and pasture the rights of which had been settled Fine. (according to Nicholas) by a final concord made before the king's justices. However the Abbot has reasons for breaking this concord and he then sets forth his own Royal grant. claim thus:—"Et idem dom. Rex postea boscum illum dedit eidem Abbati. Et profert cartam Dom. J. Regis factam post cyrographum illud que testatur quod Johannes Rex dedit et confirmavit Abbati et conventui S. Marie de Eboraco totum boscum cum forestaria, et totam terram illam ab aqua Duue, usque ad aquam que appelatur Siuena in latitudine et in longitudine a divisis Cliuelande usque ad viam que vadit de Pickering ad Helmelay per landam de Caltwayt, et prohibet forestariis suis ne de bosco illo vel de terra illa se intromittant, sed idem abbas et successores sui habeant et teneant inperpetuum bene libere etc., totum predictum boscum cum forestaria ejusdem bosci et totam predictam terram salvis predicto Regi cerno et cerna, apro, etc.[2]"

However, such titles by royal grant are much less common than prescriptive ones:—

Prescription. (46) *Henry de Cerne v. Henry Tuneire*, A.D. 1224. Tuneire is summoned to show by what right he claims

[1] Bracton's *Note-Book*, pl. 319.

[2] Ibid. pl. 254.

common of pasture on de Cerne's lands, seeing that de Cerne has no common on the lands of Tuneire. Tuneire says that he and his ancestors *have always had* common in the lands that de Cerne now holds, and moreover that de Cerne and his predecessors in title have always had the right of common pasture in Tuneire's lands if they cared to exercise it—at least it has *always been so since the Conquest,* "ita semper fuit post conquestum Angliae[1]."

(47) *The Prior of Okeburnia and Richard de Tumi v. Robert de Chounse,* A.D. 1228. Robert is called upon to show cause why he claims common in the lands at Bledelawe, seeing that the Prior has no common in Robert's land and Robert does not render him any service. Robert replies that he has every right to common in the said lands because the Prior and Richard have many free men that all claim common in his (Robert's) land and have always done so from the Conquest till now. This the Prior cannot deny; but he says that he has a large and valuable wood, while Robert has destroyed his own wood so that the Prior is not able to have his usual pannage. Robert replies that he has a good wood and more pasture than the Prior, and so he goes quit and the Prior "in misericordia[2]."

(48) *Hugo de Stretton v. William de Lanny and v. Randolph,* A.D. 1230. Hugo appears on behalf of the king to force William to show cause why he exercises common in the lands of the king, while the king has no common on his (William's) lands. Proceedings are also taken against Randolph, son of Thomas, for a similar purpose—namely to show why he claims common of pasture in the king's lands at Stretton while the king has no such right in Randolph's land, and Randolph does him no service etc. Randolph claims common in a certain marsh between Stretton and Burton and, on being asked whether the marsh pertains to the vill of Stretton or to

[1] Bracton's *Note-Book,* pl. 223.

[2] Ibid. pl. 274.

that of Burton, he says that it pertains to Burton. Further, he declares that the Burton men have always intercommoned with those of Stretton right up to the present time[1].

(49) *R. v. Richard de Rudington*, A.D. 1231. Here Richard is called upon to show why he should have common on the king's land under circumstances exactly like those of the last case (48). Richard rests his claim on the fact "that he has always had common there since the conquest of England[2]."

(50) *R. v. Abbot Walkelin*, circa A.D. 1158. This is a dispute as to the number of pigs that the Abbot can turn out in the forest at Kingesfrid. The king issues a writ ordering an inquisition as to the number that the Abbot used to turn out in the time of Henry I. "Secundum itaque praeceptum regis, per legales homines de hundredo sacramento recognitum est abbatem Attendomine in foresta Kingesfrid ccc. porcos habere sine pasnagio antiquitus solere et regis Henrici tempore habuisse quod et ita Walkeline Abbati et successoribus suis ex regis jussu concessum et confirmatum est[3]."

Easements.

We shall conclude this portion of our subject with a few cases on easements.

(51) *Prior of Sixle v. William and Adam de Baiocis*, A.D. 1225. "William and Adam have been summoned to show cause why they exact common of pasture in the land of the Prior at Leggesby, seeing that the said Prior has no common on their land and they do him no service. William and Adam come and say that they rightly have common because, before the house of Sixle was founded, their ancestors for forty years had common of pasture in the land of Leggesby, and for the reason that in hot and dry weather the men of Leggesby had an easement of water "de Pittes" in Lindwide and that they can enjoy this easement whenever they wish. [To prove] that this

[1] Bracton's *Note-Book*, pl. 433.
[2] Ibid. pl. 628; and cp. pl. 909.
[3] Bigelow, *Placita Anglo-Normannica*, p. 204.

is so they place themselves on the grand assize of our lord the king and seek recognition to be made whether they have more right in that pasture than the Prior or otherwise[1]."

(52) *Galfrid de Cruce v. John Prudumme*, A.D. 1234. John Prudumme has been summoned to answer to Galfrid de Cruce why with violence and against justice he makes use of a certain way across his land at Waleton. De Cruce declares that Prudumme has no right there and that he (de Cruce) has been wronged by Prudumme and has suffered damage to the extent of 40*s*.

John comes and defends his action, and says that all his ancestors since the conquest of England to the present day have used that way, and he declares that his father Richard was seised thereof and made use of the way in the time of King John, that he himself was always afterwards in seisin and so the right pertains to the tenement that he holds in the vill. [To prove] that this is his right and that he has so used the way, both he and his father place themselves upon the country.

Galfrid, on the other hand, denies that either John or his father was ever in seisin, except by the permission and free-will of his father Reginald de Cruce, and at a time when the land was lying fallow. The sheriff is instructed to call together a jury of twelve to investigate the facts and decide the issue[2].

Villeinage.

Our collection of cases will be complete when we have illustrated what has been said about villeinage by references to the records of some manorial courts.

We have remarked on the heritability of customary land and on the payment that the heir was required to make for the privilege of succeeding. Here are some records bearing on the subject:—

Descent.

(A) "...gus, son of Roger Clerk, gives 20*s*. to have seisin of the land that was his father's. Pledges—Gilbert ... and Hugh Cross." [1247. Manors of the Abbey of Bec—Ruislip.]

[1] Bracton's *Note-Book*, pl. 720. [2] Ibid. pl. 843.

(B) "Roger Hamo's son gives 20*s.* to have seisin of the land that was his father's and to have an inquest of twelve as to a certain croft that Gilbert Bisuthe holds. Pledges—Gilbert Lamb, William John's son, and Robert King." [1246. Manors of the Abbey of Bec—Ruislip.]

(C) "Ralph of Morville gives a half-mark on the security of Jordan of Streatham and William Spendlove to have a jury to inquire whether he be the next heir to the land that William of Morville holds. And the twelve jurors come and say that he has no right in the said land but that William Scott has greater right in the land than anyone else." [1247. Manors of the Abbey of Bec—Tooting.]

(D) "John of Bagmere demands against John, son of Walter Wells, one virgate of land with the appurtenances in the vill of Combe as his right according to the custom of the manor, and therefore as his right—for he says that one John of Bagmere, his grandfather, died seised of the said virgate with the appurtenances as his right according to the custom of the manor and from that John the right descended according to the custom of the manor to his son William, the demandant's father, whose heir the demandant is, according to the custom of the manor, (so he says) and [to establish] that such right is his he prays that an inquest be made and he gives the lord 5*s.* for such an inquest. And the said John Wells comes and answers and admits the seisin of the said John of Bagmere [the elder] and that the said William was his son, but says that no right in the said virgate of land accrued or, according to the custom of the manor, could accrue to the demandant through the said William his father; for he [the tenant] says that the said William, the demandant's father, formerly impleaded him [the tenant] in the said court before the lord touching the virgate of land now demanded, demanding against him [the tenant] the said land as his [William's] right according to the custom of the manor, etc. And at length the action between

John of Bagmere
|
William
|
John (the demandant)

Procedure in case of dispute.

them was compromised by their making accord by the lord's will and *in full court* in the manner following—i.e. that William granted, remised and quit-claimed for himself and his heirs all his right that he had, or in any manner might have, in the said virgate of land to the said John Wells for ever according to the custom of the manor: and this he is ready to verify by the record of the rolls or of twelve jurors of the said court by the leave of the lord and his steward: and he craves judgment whether, according to the custom of the manor, any right in the said land can accrue to [the demandant] against the deed of his father the said William. And the said John of Bagmere says that the said William his father never remised or quit-claimed the said land for himself and his heirs in the said court; and this he puts upon the record of the rolls or is willing that it be established by inquest of twelve jurors of the Court. And the said John Wells does the like. A day is given them at the next court to hear their judgment and their record." (Finally John Wells gains the day.) [1290. Manors of the Abbey of Bec—Combe.]

We have given this rather lengthy extract as it affords a good illustration of the procedure in case of a disputed title. We notice that litigants are beginning to follow the example of the strugglers in the royal courts in offering a money payment to have the dispute settled by inquest. Further, we observe the appeal to the court records as an evidence of title.

(E) "Edith Hale, who by judgment of the *whole* court is found to be of full age and next heir to the land formerly held by John May, renders into the lord's hand in *full court* to the use of Mathew Palmer all right and claim that she has or in any way may hereafter have to the said land; for which rendering the said Mathew gives to the said Edith 9*s.* 6*d.* and he is put in seisin by the lord and therefore gives to the lord 10*s.* for entry on this land." [1290. Manors of the Abbey of Bec—Preston.]

Free-bench.

We have said that there was free-bench of customary land:—

(F) "Peter Coterel gives two marks to have seisin of the land that was his father's, *saving to Roise his mother a third part of the same land.* Pledges—William Ketelburn, Simon Francis, William Costard and John of Senholt." [1249. Manors of the Abbey of Bec—Bledlow.]

(G) "Henry White demands one acre of land that was held by his brother John, whose heir he is, as he says. And Cristina Ticee comes and says that she has greater right to hold the said acre for her life than Henry to demand it, for she says that the said John purchased the said acre after his marriage with her and, according to the custom of the manor of Ruislîp, a wife after her husband's death should hold the *whole* of any purchase made by him after his marriage with her; and this she offers to verify by the court and she gives the lord 6*d.* to have an inquest. And the inquest says that the custom of the manor is as Cristina pleads it, so that she has greater right to hold than Henry to demand the said land. Therefore it is considered that she do hold as she now holds and that Henry be in mercy etc.: fine 3*d.*" [1296. Manors of the Abbey of Bec—Ruislîp.]

As to common rights we have this entry:—

Commons.

(H) "John Howes is accused in *full* court by the steward of attempting and endeavouring to deprive the lord and his men of their common of pasture that they have enjoyed from time *immemorial* and of having procured that they should be attached to answer for the said pasture to a writ of trespass vi et armis; and that he does so is found by an inquest of the whole court, to which inquest however he refused to submit himself, but denied all the charges made against him word by word; and he is at his law as to this matter. Pledges for his law—Robert Bar and Richard Ford." A later entry tells us that he "afterwards made his law and acquitted himself six-hundred." [1288. Manors of the Abbey of Bec—Cottisford.]

Surrender and admittance.

Records of surrender and admittance are naturally very numerous. Here are a few typical ones:—

(I) "Elias Deynte in full court resigned his land and William Deynte his son was put in seisin of it, and swore fealty and found the same pledges for 5*s.* as his relief. Afterwards he paid." [1247. Manors of the Abbey of Bec—Weldon Beck.]

(J) "Agnes Mabely is put in seisin of a farthing land that her mother held and gives the lord 33*s.* 4*d.* for entry money. Pledges—Noah, William Askil." [1275. Same manor as (I) above.]

(K) "Sarah Laundress surrendered her burgage into the lord's hands and Thomas of Fulwood is put in seisin of it and gives 4*s.* for entry money and finds pledges that [the Abbot's] franchise shall suffer no harm from him; to wit— William Alison, Thomas Julian, Thomas Baker." [1285. Manors of the Abbey of Bec—Atherstone.]

(L) "William Clerk renders into the hands of the lord a half virgate of land formerly Ivo's to the use of Juliana his daughter. Afterwards at the desire of the said Juliana the said William is put in seisin of the said land, to hold the same for the term of his life, to the intent that on his death the said Juliana shall be his next heir to have and to hold the said half virgate of land according to the custom of the manor, and in case Juliana shall die without an heir of her body, then the said land shall revert to the heirs of the said William. And the said William gives the lord 10*s.* for having the said premises recorded and enrolled in full court." [1291. Manors of the Abbey of Bec—Weldon Beck.]

CHAPTER VI.

THIRD PERIOD. FROM EDWARD I. TO HENRY VIII.

(STATUTE OF WESTMINSTER I. TO STATUTE OF USES.) (1275—1535.)

We have been dealing with medieval law as laid down by Bracton. A new chapter in legal history is begun with the reign of Edward I. Parliament has just come into being and is not long in passing some important statutes that deal with land. Even apart from this the reign is important as a mark of the beginning of that great series of law reports known as the Year Books. Our object, however, is not to write a history of English law, and it would be straying from our domain to enter into details as to the Statutes or the Year Books. For the present we are concerned with these only in so far as they explain or throw light on the ways of acquiring realty in vogue at the time. We shall content ourselves, therefore, with brief references to the Statutes, and introduce the minimum necessary to make the narrative continuous and the bearing on 'title' intelligible.

Stat. West. I. 3 Ed. I. Limitation of Actions.

The first statute of the reign was the famous Westminster I.; but, in spite of its importance in other branches of law, it has very little to do with title. In fact of the fifty-one chapters in the statute only one bears on the subject and that but indirectly. This is c. XXXIX. which fixes the beginning of the reign of Richard I. for the limitation of a writ of right. Strictly this is only a matter of pleading, but Coke has a note

"This act doth limit within what time the seisin shall be in a writ of right, and by construction the time of prescription is taken for this time[1]."

In the following year (4 Ed. I.) came the Statute de Bigamis[2]. The sixth and last chapter of this deals with the subject of implied warranty:— De Bigamis. 4 Ed. I. Implied Warranty.

"In deeds also where is contained 'dedi et concessi tale tenementum' without homage or without a clause that containeth warranty, and to be holden *of the givers* and their heirs by a certain service; it is agreed that the givers and their heirs shall be bound to warranty. And where is contained 'dedi et concessi, etc.' to be holden of the *chief lord of the fee or of other* and not of the feoffors or of their heirs, reserving no service without homage or without the foresaid clause, their heirs shall not be bounden to warranty, notwithstanding the feoffor during his own life, by force of his own gift, shall be bounden to warrant." However, only fourteen years later the statute of 'Quia Emptores[3]' did away with the significance of the first half of this chapter and from that date the warranty implied by the word 'dedi' affected only the giver and not his heirs.

The third chapter of the Statute of Glocester made a change in the law by declaring that a tenant by 'curtesy' could not bar his son by feoffment with warranty, unless the son got assets by descent. "Establie est ensement, que si home alien tenement, que il tient per le ley Dengleterre, son fils ne soit pas forbarre per le fait son pier (de que nul heritage luy discend) a demander et recoverer per briefe de mortdancester de la seisin sa mier, tout face le charter son pier mention que luy et ses heyres sont tenus a la garrant. Et si heritage luy discend de part son pier, donques soit il forclose de la value del heritage que luy est discendus." Stat. of Glocester. 6 Ed. I. c. 3. Curtesy.

But for our purposes the first really important statute was that of 1279—de Viris Religiosis. Its object was to De Viris Religiosis. 7 Ed. I. Mortmain.

[1] Coke's *Second Institutes*, I. p. 238 (I).

[2] So called from its fifth chapter.

[3] See p. 109.

restrain the alienation of lands into mortmain. This had already been partially effected by a clause in Magna Carta. "Non licet alicui de cetero dare terram suam alicui domui religiosae ita quod illam resumat tenendam de eadem domo[1]." The restriction was now extended to corporations generally whether lay or ecclesiastical. "Ordinavimus quod nullus religiosus aut alius quicunque terras aut tenementa aliqua emere vel vendere, aut sub colore donationis aut termini vel alterius tituli cujuscunque, ab aliquo recipere, aut alio quovis modo, arte vel ingenio sibi appropriare praesumat sub foris factura eorundem, per quod ad manum mortuam terrae et tenementa hujusmodi deveniant quoquo modo...[2]" However this prohibition did not long check 'religious men' in their efforts to acquire property. The statute said nothing about title by 'suffering a recovery' and so to this mode of conveyance recourse was had. Thus it required a further enactment to put a stop to this simple method of evading the Statute de Religiosis, and it was only six years after that statute that the subject was again dealt with in the famous Statute of Westminster the Second.

Stat. West. II. c. 1, de Donis. 13 Ed. I. Estates tail.

The Statute of Westminster the Second is of great length[3] and deals with a variety of legal problems. The opening chapter—generally referred to as the Statute de Donis (Conditionalibus)—is for our purposes the most important one, for it created a new species of estates of inheritance, the estate tail. Bracton has already made us familiar with conditional gifts and what look very like estates tail. It should be remembered, however, that a gift to a man and his wife and the heirs of their bodies was held to be an ordinary estate of inheritance conditional on issue being born. Until the birth of issue there was merely a life estate, but after that the estate became a fee simple and was alienable at the will of the donee. The Statute de Donis changed all this by forcing

[1] Magna Carta (1217), c. XLIII.

[2] Statutum de Viris Religiosis. 7 Ed. I. Stat. 2, c. XIII.

[3] It contains fifty chapters.

the donee to respect the form of the gift. It prevented him from alienating at the expense of the heirs of his body and in this way created, as has been said, what was really a new species of estate. "Dominus rex statuit quod voluntas donatoris, secundum formam in charta doni sui manifeste expressam, de caetero observetur, ita quod non habeant illi, quibus tenementum sic fuit datum sub conditione, potestatem alienandi tenementum sic datum, quo minus ad exitum illorum, quibus tenementum sic fuerit datum, remaneat post eorum obitum, vel ad donatorem, vel ad ejus haeredem (si exitus deficiat) revertatur, per hoc quod nullus sit exitus omnino, vel (si aliquis exitus fuerit, et per mortem deficiet) haerede de corpore hujusmodi exitus deficiente[1]."

The introduction of this new estate[2] in land added greatly to the complexity of our legal system by increasing the number of possible combinations of modes in which a donor could dispose of his interests. It may be noted here that although the statute speaks of the donor's intention as expressed in the deed of gift, the courts admitted parol evidence as to the form of gift so that a deed was not absolutely essential[3].

Stat. West. III. 18 Ed. I. Quia Emptores.

The last statute that need occupy our attention at this stage is the very important one of Westminster III. (18 Ed. I.), usually spoken of as the Statute of 'Quia Emptores[4].' It had the effect of putting a stop to the further growth of mesne lords, and this it did by enacting that if *B* held lands in *fee simple* of *A*, and alienated them by grant to *C*, then *C* simply stepped into *B*'s shoes and held directly of *A* and not of *B* as formerly. It should be observed, however, that this statute did not prevent a tenure arising in case of the alienation of a fee-tail, or a term of life[5].

[1] Statutum de Westminst. Secundo, c. 1.

[2] The estate tail was not the only estate created by this statute. See note, p. 115.

[3] See *Y. B.* 20 Ed. I. p. 130.

[4] So called from the opening words "quia emptores terrarum et tenementorum etc.," Stat. de Westminst. Tertio, c. 1.

[5] See Littleton, *Tenures*, 1. 2, § 19.

Even from this rapid survey it will be seen that the reign of Edward I. was marked by considerable legislative activity. However this sudden intrusion of Parliament into our fields was but a brief one, for after 'Quia Emptores' there was no enactment of first-rate importance till the great event of 1535, the Statute of Uses. Not that the law was stationary during the intervening two centuries and a half. It developed then, as it had done before, in the gradual manner characteristic of judge-made law. It was in this period, too, that the supplementary system of law afterwards known as equity was being built up. To this we shall have to devote a special section later. In the meanwhile, confining our attention to the common law, perhaps we cannot do better than follow in the footsteps of Littleton[1]. His famous work on '*Tenures*' presents in very brief space a survey of the whole field of realty as known in his day. Let us see something of the light it throws on the subject of 'title.'

Littleton's *Tenures*.

Fee Simple. Feoffment by livery of seisin.

In dealing with a fee simple, the old charter of feoffment accompanied by livery of seisin was still in use. As in earlier days, actual seisin was most important, although there was a certain relaxation when several tenements in the same county were to be conveyed. "And if a man will make a feoffment, by deed or without deed, of lands or tenements that he hath in divers towns in one county, the livery of seisin made in one parcel of the tenements in one town in the name of all the rest is sufficient for all other lands and tenements comprehended within the same feoffment in all other towns in the *same* county. But if a man maketh a deed of feoffment of lands or tenements in *divers* counties, then it behoveth in every county to have a livery of seisin[2]."

The absence of actual seisin could be excused if the donee were restrained by fear of violence from entering upon the land. In such a case it would suffice if the

[1] Littleton was made a judge of the Court of Common Pleas on the 26th of April 1466 (6 Ed. IV.).

[2] Littleton, *Tenures*, I. 7. 61; cf. III. 7. 417.

donee went near the land and by word of mouth claimed it as his[1] Moreover, if he were too ill to go himself, he might send a substitute[2]. Coke remarks that the fear "must not bee a vaine feare, but such as may befall a constant man" and that it must concern the donee's person, not his goods.

As to the necessary words in the conveyance, Littleton says:—"If a man would purchase lands or tenements in fee simple, it behoveth him to have these words in his purchase—To have and to hold to him *and to his heirs*; for these words (his heirs) make the estate one of inheritance. For if a man purchase lands by these words 'To have and to hold to him for ever'; or by these 'To have and to hold to him and his assigns for ever'; in these two cases he hath but an estate for term of life, for that there lack these words (his heirs), which words only make an estate of inheritance in all feoffments and grants[3]." In a lengthy note on this passage Coke analyses a deed of feoffment and divides it into eight formal parts. Into these matters we need not follow him, for the forms were not essential to the feoffment. "For if a man by deede give lands to another and to his heirs without more saying, this is good, if he put his seale to the deede, deliver it and make livery accordingly. So it is if *A* give lands to have and to hold to *B* and his heires. And yet no well advised man will trust to such deeds, which the law by construction maketh good, ut res magis valeat; but when forme and substance concurre, then is the deed faire and absolutely good[4]."

["The date of the deed many times antiquity omitted; and the reason thereof was for that the limitation of prescription, or time of memory, did often in processe of time change; and the law was then holden, that a deed bearing date before the limited time of prescription, was

[1] Littleton, III. 7. 419. His authority is reported in *Booke of Assises*, 38 Ed. III. pl. 23.

[2] Ibid. III. 7. 434.

[3] Ibid. I. 1. 1.

[4] Coke's *Institutes*, 7 a.

not pleadable; and therefore they made their deedes without date, to the end they might alledge them within the time of prescription. And the date of the deedes was commonly added in the raigne of Ed. 2 and Ed. 3 and so ever since[1]."]

A charter of feoffment.

We may fitly conclude the account of this mode of conveyance by transcribing a charter of feoffment from the reign of Henry VI.

"Sciant praesentes & futuri, me Robertum Morton Clericum tradidisse dimisisse & praesenti cartâ meâ confirmasse Ricardo Comiti Sarum, Roberto Constable, Roberto Stele Clerico, Thomae Wytham, & Thomae Walton omnia terras, tenementa, servicia, reversiones, ac possessiones quaecunque cum suis pertinenciis quae habeo in villis seu hamelettis de Welton juxta Ludam, Alvingham, Skamelesby & Hameringham, in comitatu Lincolniae: Habendum & tenendum praefatis comiti, R. C., R. S., T. W., & T. W., haeredibus & assignatis suis imperpetuum, omnia praedicta terras, tenementa, redditus, servicia, reversiones ac possessiones quaecunque cum suis pertinenciis. In cujus rei testimonium huic cartae meae sigillum meum apposui. Hiis testibus—Thomâ Cumberworth Milite, Waltero Tailboys, Ricardo Haunsard, Thomâ Meres, Willelmo Percy, armigeris & aliis. Datum apud Welton praedictam, vicesimo die Ianuarii, Anno Regni Regis Henrici sexti post conquestum vicesimo primo[2]."

Fines.

Another important mode of conveyance was by means of a fine. The form and attributes of a final concord were discussed in the preceding period and there had been little change when Littleton wrote. On one matter some fluctuations took place, namely as to the power of a fine to bar adverse claims if not set up within a short period. Originally this period of limitation was a year and a day from the levying of the fine, but the law was altered by Statute 34 Ed. III. which took away this power of barring future claims[3]. C. 16 says "And it is accorded that the plea of non-claim of fines that from henceforth shall be levied shall not be taken or holden for any bar in time to

[1] Coke's *Institutes*, 6 a. [2] *Form. Ang.* CCCXLVI.
[3] See Littleton, III. 7. 441.

come." This state of affairs however did not last very long, for the ancient order was restored by 1 Rich. III. and 4 Hen. VII. But even then there were some modifications, for proclamations were made necessary and the time for putting in an adverse claim was extended to five years.

A single instance of a final concord, taken from the reign of Edward IV., will suffice to illustrate its form within the present period:—

"Haec est finalis concordia facta in Curiâ Domini Regis apud Westm. à die Paschae in unum mensem, anno regnorum Edwardi Regis Angliae & Franciae quarti a conquestu nono, coram Roberto Danby etc. Justiciariis & aliis Domini Regis fidelibus tunc ibi praesentibus, Inter Johannem Ouston Clericum querentem, et Nicholaum Gaynesford Armigerum & Margaretam uxorem ejus deforciantes, De duobus mesuagiis, duobus cotagiis, ducentis triginta & quatuor acris terrae, sexaginta & tribus acris prati, duodecim acris bosci, sex acris marisci, & septuaginta & una solidatis redditus cum pertinenciis in Netherburneham, Upperburneham, Westwode, Ouston, Epworth, Estlande, & Haxay infra insulam de Axeholme in Comitatu Lincolniae, Et de sexdecim solidatis redditus cum pertinenciis in Mesterton in Comitatu Notynghamiae, unde Placitum convencionis summonitum fuit inter eos in eadem curia: scilicet quod praedicti Nicholaus & Margareta recognoverunt praedicta tenementa & redditus cum pertinenciis esse jus ipsius Johannis ut illa quae idem Johannes habet de dono praedictorum Nicholai & Margaretae: Et illa remiserunt & quietam clamaverunt de ipsis Nicholao & Margaretâ & haeredibus suis inperpetuum: Et praeterea iidem Nicholaus & Margareta concesserunt pro se & haeredibus ipsius Margaretae, quod ipsi warantizabunt praedicto Johanni & haeredibus suis, praedicta tenementa & redditus cum pertinenciis, contra Georgium Abbatem Westmonasterii & successores suos inperpetuum: Et pro hac recognitione, remissione, quieta clamatione, warantia, fine & concordia, idem Johannis dedit praedictis Nicholao & Margaretae ducentas marcas argenti[1]."

[1] *Form. Ang.* CCCLXXXIX. Formerly a married woman could not dispose of her property except by a fine in *which the husband concurred*, but in the present period another method came into fashion—the common recovery, see p. 114.

Evidence of fine.

The evidence of title by fine was discussed when the subject was first introduced. It must now be added that a statute was passed[1] in this period enacting that all the proceedings on fines, both previous to the final concord and at its acknowledgment, should be enrolled in the records of the Court of Common Pleas. The chirograph of a fine is evidence to all persons and in all courts of such a fine[2]. "It is," says Cruise, "a principle of common law that the evidence of a record is of so high and certain a nature, that its authenticity is never permitted to be called in question; so that no averment can be made against any fact that is once upon record; and therefore, when the foot or chirographum of a fine is recorded, no averment can be made as to the caption or time of its acknowledgement, but it must be considered as a fine of that term in which it is recorded, nor can it be falsified until it is vacated or reversed by the Court of Common Pleas[3]."

Recoveries.

Closely analogous to the mode of acquiring property by a fictitious suit ending in a final concord was the method of 'suffering a recovery.' "A recovery, in its most extensive sense, is a restitution to a former right by a solemn judgment of a court of justice; and judgments, whether obtained after a real defence made by the tenant, or upon his default, or feint plea, had equally the same force and efficiency to bind the right of the land so recovered, and to vest a free and absolute estate in fee simple in the recoveror. A common recovery is a judgment obtained in a fictitious suit brought against the tenant of the freehold, in consequence of a default made by the person who is last vouched to warranty in such fictitious suit[4]."

This mode of conveyance was invented by ecclesiastics in order to evade the statutes of mortmain. "To effect this purpose the religious houses used to set up a fictitious

[1] 5 Hen. IV. c. 14.
[2] Gilbert, *Evid.*
[3] Cruise, *Fines.*
[4] Cruise, *Common Recoveries*, chap. I. p. 1.

title to the lands intended to be given or sold, and brought an action against the tenant to recover them; the tenant by collusion made no defence; whereby judgment was given for the religious house, which then recovered the lands by sentence of law upon a supposed prior title[1]." Once invented the method was soon adopted by laymen as well as by ecclesiastics as a convenient means of transferring land. However this extensive use of fictions was not allowed to go on without a check. The eleventh chapter of the Statute of Glocester provided that a termor for years might falsify a recovery feigned by the owner of the inheritance, and the system received a much more severe blow from the Statute of Westminster II. c. 32. This enacted that "in all cases where ecclesiastics recovered lands by default a jury should try the right of the demandants to the land, and if the religious house were found to have a title, they should recover them; but otherwise it should be forfeited to the lord of the fee." In consequence of this legislation common recoveries practically disappeared for a long time. However they were brought in again at a later stage as an ingenious means of evading the restraints on alienation imposed by the Statute de Donis. We shall have to return to them when dealing with estates tail.

Tenancy by elegit.

Note. Before dismissing the subject of title by the judgment of a court, reference may be made to another species of that title that had its origin in the Statute of Westminster II. (see p. 109, note 1). The most important result of that statute has been already discussed—its creation of the estate tail; but in addition to this it gave rise to another interest in land, tenancy by *elegit*. It was enacted that a *judgment* creditor could *elect* to have either a writ of fi. fa. executed upon the goods of the debtor or one commanding the sheriff to deliver "omnia catalla debitoris (exceptis bobus et afris carucae) et *medietatem* terrae." This was called a writ of elegit and the creditor thus put in possession by the sheriff was styled 'tenant by elegit.' Closely resembling this estate were the

[1] Cruise, *Common Recoveries*, I. 2.

tenancies by statute merchant and statute staple created about the same time by Stat. of Acton Burnell (11 Ed. I.) and Stat. de Mercatoribus (13 Ed. I.). However, it would be out of place to discuss any of these estates in the text, for in spite of their importance, and of their close resemblance to freehold, they passed to the tenant's executor or administrator and not to his heir, and so were at most but chattels real. See Coke, *Second Inst.* 396 and Coke, *Litt.* 436.

Lease and release.

Another method of conveyance in vogue at this time, and one destined to become for long the usual one in practice, was that known as the 'lease and release.' *A*, a tenant in fee simple, leased his lands to *B* for a term of years, and after *B* had entered, *A* released all his rights to *B* who thus obtained the fee simple. The original lease might be but a tenancy at will, and livery of seisin was unnecessary as the tenant was already in possession[1]. Possession by the tenant was, however, essential. "Also if a man letteth to another his land for term of years, if the lessor release to the lessee all his right etc. before that the lessee hath entered into the same land by force of the same lease, such release is void, for that the lessee had not possession in the land at the time of the release, but only a right to have the same land by force of the lease. But if the lessee enter into the land and hath possession of it by force of the said lease, then such release made to him by the feoffor or by his heir is sufficient to him by reason of the privity which by force of the lease is between them....In the same manner it is, as it seemeth, where a lease is made to a man to hold of the lessor at his will, by force of which lease the lessee *hath possession*, if the lessor in this case make a release to the lessee of all his right, this release is good enough for the privity that is between them[2]." Littleton also remarks that if I let to a man for a term of years by force whereof he is in possession, and afterwards release all my right to him, then I give him only a life estate. If I wish him to have more than this I must say something definite about an estate of inheri-

[1] Littleton, III. 8. 460. [2] Ibid. §§ 459 and 460.

tance, as that he is to have a fee simple or fee tail. "If I release to him and to his heir, then he hath a fee simple; if to him and to his heirs of his body begotten—a fee tail[1]." In other words, in the release the estate must be properly marked out. A few examples will show the usual form of release.

Form of release.

(A) "Omnibus Christi fidelibus ad quos hoc praesens scriptum pervenerit, Ricardus de Hothleghe senior salutem in Domino. Noveritis me remisisse, concessisse, & de me & haeredibus meis quiete clamasse Rogero filio Johannis de Dalinggerugge & haeredibus & assignatis suis, in plena & pacifica seisina praedicti Rogeri, totum jus & clameum quod habui vel habere potui seu potero in omnibus terris & tenementis cum suis pertinenciis, quae praedictus Rogerus habuit ex dono & concessione Johannis filii mei in villa & parochia de Hertefelde seu in quibuscunque aliis terris & tenementis cum suis pertinenciis me & haereditatem meam qualitercunque contingentibus in eadem villa; Ita quod ego praedictus Ricardus nec haeredes mei nec aliquis nomine nostro, nihil juris seu clamii in praedictis terris & tenementis cum suis pertinenciis de caetero vendicare poterimus, exigere, nec reclamare imperpetuum; set ego praedictus Ricardus & haeredes mei omnia praedicta terras & tenementa cum pertinenciis praefato Rogero haeredibus & assignatis suis contra omnes gentes warrantizabimus imperpetuum. In cujus rei testimonium, huic scripto quietae clamanciae sigillum meum apposui; et quia sigillum meum pluribus est incognitum, sigillum commune civium civitatis Cicestriae eidem apponi procuravi. Hiis testibus.... Datum apud Cicestriam die Jovis in festo Sancti Bartholomaei Apostoli, anno regni Regis Edwardi tercii post Conquestum quartodecimo[2]."

(B) "A toux iceux qui ceste lettre verront ou orrount, Edward Cowdray & John Peperwhit salutz en Dieu. Come nous sumes enfeffes joyntement ove Hugh Seint John, Robert Hulle & aultres, Thomas Ponynges Sire de Seint John, en le Manoir de le Moote ove lez appurtinaunces en le Counte de Hertford, come en fee symple: Saches, nous avoir relesse,

[1] Littleton, III. 8, § 465. [2] *Form. Ang.* DCCI.

pour nous & noz heirs a toux jours, tout le droit & claym que nous avons ou per ascune voye avoir purrons eut apres, en le dit Manoir ove lez appurtinaunces; Issint que nous, nul de nous, noz heirs, ne nul autre en nostre noum nulle manere action ne droit naveroms desorenavaunt, en le Manoir avaunt dit ne en nul parcel de icell; mays de toutez actions & clayms sumes exclusez per icestes; enseeles de noz seells. Done le Vyntisme jour de Septembre, lan del regne le Roy Henry quarte puis le Conquest secunde[1]."

Confirmation.

Instead of a release, a deed of confirmation was sometimes employed. The substance of such a deed was as follows. "Know all men etc. that I, *A* of *B*, have ratified, approved and confirmed to *C* and *D*, the estate and possession that I have of and in the messuage etc. with appurtenances etc.[2]" Just as in the case of a release, confirmation was appropriate when possession had already been obtained by the donee; but in certain circumstances this method of conveyance was available when a release would have been void. Thus if *A* had let land to *B* for term of life and *B* sub-let to *C* for forty years (say), then, if *C* entered into possession, *A* might *confirm* this term of years and in that case could not disturb *C* if *B* died before the end of forty years. Now *A* could not effect this by means of a release; such an instrument would be void "for that then there was no privity between *A* and *C*, for a release is not available to a tenant for years except when there is a privity between him and him that releaseth[3]." The distinction between a release and confirmation is further illustrated by the fact that if *A* had let to *B* for a term of years and afterwards *confirmed* this without putting more words in the deed, then *B* would get no more than he had before; but if, on the other hand, *A released* all his right, then *B* would get at least a life estate, and if proper words were used a fee simple or fee tail[4].

[1] *Form. Ang.* DCCX.
[2] Littleton, III. 9. 515.
[3] Ibid. §§ 516 and 517.
[4] Ibid. §§ 545 and 546.

As to the form of the deed of confirmation, it may be mentioned that the word confirmavi need not be employed, dedi or concessi would do equally well. Thus, says Littleton, "If I be disseised of a carve of land and make such a deed; Sciant praesentes etc. quod dedi to the disseisor (or quod concessi to the disseisor) the said carve of land etc., and I deliver only the deed to him without livery of seisin of the land, this is a good confirmation and as strong in law as if there had been in the deed the word confirmavi[1]." Here is a confirmation in fee of land, combined with a feoffment in fee of other lands :—

Form of confirmation.

"Noverint universi per praesentes, me Johannem atte Stokke filium & haeredem Ricardi atte Stokke, ratificasse, confirmasse, & hoc praesenti scripto meo approbasse & relaxasse, Ricardo Cheddere haeredibus & assignatis suis imperpetuum, totum statum suum quem habet ex concessione Johannis Lythyate, in omnibus clausis, pascuis, & pasturis, cum pertinenciis in parochia de Cherchehull, quae vocantur Willyngg: Habendum & tenendum eidem Ricardo haeredibus & assignatis suis, de Capitalibus Dominis feodi illius imperpetuum, per servicia inde debita & de jure consueta. Dedi etiam & concessi & praesenti scripto meo confirmavi eidem Ricardo haeredibus & assignatis suis, omnia terras & tenementa mea, prata, pascuas, pasturas, una cum viis, semitis, redditibus, consuetudinibus, serviciis tam liberorum quam villanorum, ac wardis, maritagiis, reversionibus, escaetis, & aliis quibuscunque suis pertinenciis, quae habeo, habui, seu aliquo modo ante haec tempora exegi seu clamavi, apud la Stokke, Cherchehull in parochia de Banewell, Apston in parochia de Wedmore, Alwarton & Alweryngton & Hyde in parochia de Bageworthe, Cosyngton, & Chelton: Habendum & tenendum omnia praedicta terras & tenementa, prata, pascuas & pasturas, una cum viis, semitis, redditibus, consuetudinibus, serviciis tam liberorum quam villanorum, ac wardis, maritagiis, reversionibus, escaetis & aliis quibuscunque suis pertinenciis, praedicto Ricardo haeredibus & assignatis suis imperpetuum: De capitalibus dominis feodi illius per servicia inde debita & de jure consueta. Et ego vero praedictus Johannes haeredes & assignati mei,

[1] Littleton, III. 9. 531.

omnia supradicta terras & tenementa, prata, pascuas, & pasturas, cum suis ubique pertinenciis, praefato Ricardo haeredibus & assignatis suis, contra omnes gentes warrantizabimus, acquietabimus, & imperpetuum per praesentes defendemus. In cujus rei testimonium huic scripto meo sigillum meum apposui. Datum apud Wedmore, duodecimo die mensis Julii, anno regni Regis Henrici quinti post conquestum quarto[1]."

Exchange.

Another title, employed from an early period, had the peculiarity of not requiring livery of seisin. This was the exchange. If two owners of equal estate—i.e. both fee simple, or both fee tail special, or the like—agreed to exchange their property *and afterwards made entry*, this was a good conveyance. "And such an exchange made by parol of tenements within the same county is good enough; but if the tenements be in different counties a deed indented is essential[2]." It was important that the estates should be 'equal' in the sense mentioned[3], otherwise the transaction was void. We append an example of an exchange from the reign of Edward III.

Form of exchange.

"Sciant praesentes & futuri, quod Ego Alicia Dran dedi concessi & hac praesenti carta mea confirmavi, Domino Willelmo Comiti Sarum, septem pecias prati continentes unam acram & dimidiam, octo perticatas & dimidiam in Southmede, ex opposito manerio de Caneford in excambium pro una acra & dimidia prati in prato dicti Domini Comitis in Netherwode, videlicet, de illis quinq; acris quas modo teneo de ipso Domino Comite ad firmam, sub forma quae sequitur, Habendum & tenendum praedictas septem pecias prati in Southmede praefato Willelmo Comiti, haeredibus & assignatis suis, de Capitalibus Dominis feodi illius, per servicia inde debita & de jure consueta inperpetuum. Et si contingat praefatum comitem, haeredes vel assignatos suos, de praedictis septem peciis prati in Southmede, per praefatam Aliciam, vel per haeredes Henrici Dran nuper mariti sui, vel per aliquem alium implacitari, ita quod in curia Domini Regis per judicium dictas septem pecias prati

[1] *Form. Ang.* CXXIX. [2] Littleton, I. 7, §§ 62 and 63.

[3] Of course equality of size or value was not at all necessary. See Littleton, I. 7, §§ 64 and 65.

vel aliquam partem, amiserit; quod extunc bene liceat praefato Comiti, haeredibus & assignatis suis, in praedictam unam acram & dimidiam prati, in prato de Netherwode, reintrare & seisire & penes se & haeredes suos inperpetuum retinere, sine contradictione aliquali. Et ego vero praedicta Alicia & haeredes mei, praedictas septem pecias prati in prato de Southmede supradicto, praefato comiti haeredibus & assignatis suis in forma supradicta contra omnes gentes warantizabimus inperpetuum & defendemus. Pro hac autem donatione & concessione nos praefatus Comes dedimus, concessimus & hac praesenti carta nostra confirmavimus, praefatae Aliciae unam acram & dimidiam prati, in prato de Netherwode supradicto in Excambium pro septem peciis prati in prato de Southmede supradicto, in forma supradicta: Habendum & tenendum praedictam unam acram & dimidiam in prato de Netherwode praedictae Aliciae & haeredibus Henrici Dran, nuper mariti sui, de Capitalibus Dominis feodi illius, per servicia inde debita & de jure consueta inperpetuum. Et si contingat—(here follows a proviso like the one above on the part of Alice; and a like warranty on the Earl's part). In cujus rei testimonium—Hiis testibus..... Datum apud Caneford, die Lunae proximo post festum Sancti Hillarii, anno Regni Regis Edwardii tercii post conquestum quadragesimo octavo[1]."

Surrender.

Real estate could also be acquired by means of a surrender. For example, a life tenant *in possession* might surrender his estate to the remainderman without formal entry. "Surrender," says Coke, "is properly a yeelding up an estate for life or yeares to him that hath an immediate estate in reversion or remainder wherein the estate for life or years may droune by mutual agreement between them[2]." "A surrender differs from a release in this respect, that the release operates by the greater estate's descending upon the less:—a surrender is the falling of a less estate into a greater. As there is necessarily a privity of estate between the surrenderor and the surrenderee, no livery of seisin is necessary to perfect a surrender[3]."

[1] *Form. Ang.* CCLXXVIII. [2] Coke's *Institutes*, 338 a.
[3] Butler's Note (1) to Coke's *Inst.* 337 b.

Fee tail.

So far our attention has been directed mainly to the fee simple. Something must now be said of that innovation of the present period—the fee tail. We have already given an account of the legislation that set up this new species of estate. "Tenant in fee tail," says Littleton, "is by force of the statute of Westminster II. cap. 1[1], for before the said statute, all inheritances were fee simple[2]." If the obvious intention of the framers of that statute had been carried out, we should not have had to delay long over the fee tail. For the estate would then have been inalienable, and after it had once been established the only possible title would have been that by descent[3]. And indeed this was what really happened for some time after the Statute de Donis. However, restrictions on alienation were naturally unpopular with all but a few interested parties, and it was not very long before attempts were made to avoid the restraints imposed by the legislature. Still progress in this direction was not rapid and it was long before the method ultimately adopted was perfected. The first step was a judicial decision to the effect that the issue in tail could not avoid the alienation of his ancestor, provided that he was left a proper recompense for the loss of his estate[4]. The further development was intimately associated with the current doctrine of warranty. "But he that demandeth fee tail by writ of formedon in descender shall not be barred by *lineal* warranty, *unless he hath assets by descent in fee simple* by the same ancestor that made the warranty. But *collateral* warranty is a bar to him that demandeth fee tail, without any other descent of fee simple, except in cases that are restrained by the statutes[5]." Or, as Reeves puts it, "An estate tail might be barred by the warranty of an ancestor under whom the estate was claimed, if accompanied with assets, and by the warranty of an ancestor under whom the estate was not claimed, without any assets; which

[1] See p. 108. [2] Littleton, I. 2. 13.
[3] On title to fee tail by descent, see p. 130.
[4] 10 Rep. 37 b. [5] Littleton, III. 13. 712.

first warranty has since been called lineal and the latter collateral, because collateral to the title by which the estate was claimed. These were treated as bars to which an estate tail was subject in its very creation, and which were unaffected by the prohibition of the Statute de Donis[1]."

At first the courts were strict in requiring a real and bonâ fide recompense to the issue of a tenant in tail who had avoided the restrictions of de Donis and bound his heirs to warranty. A great step, however, was taken in the well-known Taltarum's case[2] when it was decided that a nominal and even fictitious recompense to the issue in tail would bar them from disputing their ancestor's alienation, and bar not only them but all persons in remainder or reversion. From this time recoveries again came to the front and remained in possession of the field as the regular method of barring estates tail. Let us see then more definitely what a common recovery was and how it worked as a bar. As has already been said, it was a judgment obtained in a real action, and although it depended on a series of fictions it required all the formalities of an actual suit to be carefully attended to. The first thing to be done was for the demandant, to whom the lands etc. were to be conveyed, to sue out a regular writ or praecipe against the tenant of the freehold (called the tenant to the praecipe). "In obedience to this writ the tenant of the freehold appears in court, either in person or by attorney; but, instead of defending the title of the land himself, he calls on some other person who upon the original purchase is supposed to have warranted the title, and prays that such person may be called in to defend the title which he warranted, or otherwise to give the tenant lands of equal value to those that he shall lose by defect of his warranty. This is called the voucher or calling to warranty. The person thus called to warrant the title (the vouchee) appears in

Taltarum's case.

Common recovery.

[1] Reeves, II. 340.

[2] Y. B. 12 Ed. IV. 19.

court, is impleaded, and enters into the warranty, by which means he takes upon himself the defence of the land. The demandant then desires leave of the court to imparl or confer with the vouchee in private, which is granted of course. Soon afterwards the demandant returns to court, but the vouchee disappears, or makes default; in consequence of which it is presumed by the Court that he had no title to the lands demanded in the writ, and therefore could not defend them; whereupon judgment is given for the demandant, now called the recoverer, to recover the lands in question against the tenant, and judgment is also given for the tenant to recover against the vouchee lands of equal value, in recompense for the lands so warranted by him, and now lost by default. This is called the recompense, or recovery in value; but as it is customary to vouch the crier of the court (who is hence called the common vouchee), the tenant can have only a nominal recompense for the lands thus recovered against him by the demandant. Finally a writ of habere facias seisinam is sued out, directed to the sheriff of the county in which the lands thus recovered are situated; and on the execution and return of this writ the recovery is completed[1]."

Reversions.

It was remarked above that one effect of the Statute de Donis was the introduction of a greater complexity into our legal system by increasing the number of combinations into which it was possible to divide and dispose of one's interests in realty. This has been illustrated by the discussion of the estate tail, and it receives further confirmation from the fact that it was in the present period that reversions and remainders came prominently to the fore and that the complex system of rules relating to them began to be constructed. "A reversion" says Coke "is where the residue of the estate always doth continue in him that made the particular estate[2]." The regular mode of conveying a reversion was by deed of

[1] Cruise, *Common Recoveries*, pp. 11—12.
[2] Coke, *Inst.* 22 b.

grant. It must be observed, however, that in case the conveyance were made to any other than the tenant of the particular estate, the attornment of that tenant was necessary to complete the transaction. Thus if *A* leased to *B* for a term of years, or for life, or made him a gift in tail, reserving a certain rent, and afterwards wished to convey his reversion to *C*, then *A* must execute a deed of grant in *C*'s favour and obtain the attornment of *B*[1]. If the grant to *C* were brought about by a deed of confirmation, confirming *B* in his estate and granting *C* his, then, if *B* accepted this deed, that would be a sufficient attornment[2]. Supposing, on the other hand, that *A* wished to convey the reversion to *B*, then his usual course was to surrender his right to him by deed. The reversion could also be conveyed by a fine or by suffering a common recovery; and this was a bar to all reversions depending on the estate of which the recovery was suffered[3].

Remainders.

As to a remainder, which Coke defines as "a residue of an estate in land depending upon a particular estate, and *created together with the same*[4]," Littleton remarks that if *A* granted a term of years to *B* (with or without a deed) with remainder over to *C* for life, or in fee simple or tail, then *A* must make livery of seisin to *B*, not for his sake, but to secure the rights of the remaindermen who would otherwise get nothing[5]. A release was the regular means of conveying a vested remainder[6], but it is to be noted that the remainderman must "have the remainder in deed at the time that the release is made, and not merely the right of a remainder[7]." A man could release only what he actually had at the time of the release, and any attempt to use this form of conveyance for future estates was void. "These words that are commonly put in releases—quae quovis modo in futurum habere potero—are void in law; for no right passes by a release but the

[1] Littleton, III. 10. 572.
[2] Ibid. § 573.
[3] Cruise, *Common Recoveries*, 337 b.
[4] Coke, *Inst.* 49 a.
[5] Littleton, I. 7. 60.
[6] Ibid. III. 8. 450.
[7] Ibid. § 451.

right that the releasor has at the time the release is made[1]." A remainder could also be conveyed by a fine or a common recovery[2].

Contingent remainders.

Contingent remainders were common towards the end of this period, but the exact date of their origin is doubtful. We may say, however, that before the reign of Henry VI. their validity was open to question, but that from that time they ceased to be under suspicion. Littleton has something to say of these remainders[3], but in his time the rules that afterwards governed this species of estates were not yet clearly defined. All we need say is that a contingent remainder could not be transferred inter vivos except by means of a fine or common recovery[4]; it was, however, transmissible to the heirs of the person to whom it was limited, if that person died before the contingency happened.

Dower.

We shall look next at the modes of acquiring realty through marriage. The law as to dower had undergone some changes and extensions since Bracton's day. The changes referred to the amount of 'reasonable dower' and will be mentioned a little later. The extensions arose from the introduction of estates tail, for the right of dower was extended to the wife of a tenant in fee tail (general or special) and that whether the wife had issue of her husband or not.

As has been indicated before, the limit of age of the wife was now fixed, and it was decided that in order to claim dower the wife must be at least nine years old at the time of her husband's death[5]. In the case of an endowment 'by the assent of the father,' i.e. when the husband endowed his wife with land that was the father's (the son being the heir apparent), Littleton says that "it hath been said that it behoveth the wife to have a

[1] Littleton, III. 8. 446. [2] Cruise, *Fines and Recoveries*.

[3] Littleton, III. 13. 720—723.

[4] Cruise, *Fines and Recoveries*; Fearne, *Contingent Remainders*, 7th ed. p. 366.

[5] Littleton, I. 5. 36.

deed of the father's to prove his assent[1]." He was doubtful, however, whether in such a case the wife could claim dower if under nine years of age; but Coke maintained that "the dower being made by assent" the wife could not be disqualified by age; "for consensus tollit errorem[2]."

The wife was not entitled to dower from lands held by her husband jointly with another; but it was otherwise with tenancies in common[3]. It is to be noted, too, that it was useless for a husband to endow his wife *specifically* at the church door of lands that he held in tail. In any case the wife would have the common law share[4], but the husband could not give her more and he could not make a *specific* appointment from an estate tail[5]. In the case of special tail the wife could not obtain dower unless she *might* have had children that could inherit—she need not actually have had such children. "If tenements be given to a man and to the heirs that he shall beget of the body of his wife...and the husband die without issue, the same wife shall be endowed of the same tenements; because the issue that she by possibility might have had by the same husband, might have inherited the same tenements. But if the wife dieth and the husband takes another wife and dieth, his second wife shall not be endowed in this case[6]."

Various kinds of dower.

Littleton distinguishes five kinds of dower:—(1) dower by common law (one-third), (2) dower by special custom (usually one-half, but sometimes the whole of the husband's lands[7]), (3) dower ad ostium ecclesiae (what we have called specific dower), (4) dower ex assensu patris, and (5) dower de la plus belle.

We have already, in following Bracton, had occasion to deal with all these forms except the last.

As to the first an important change, already fore-

[1] Littleton, I. 5. 40. [2] Coke, *Inst.* 37 a. [3] Littleton, I. 5. 45.
[4] i.e. one third; or more in case of special custom.
[5] Littleton, I. 5. 46. [6] Ibid. § 53.
[7] e.g. in Burgage. See Littleton, II. 10. 166.

shadowed[1], had taken place since Bracton's day. At that time 'reasonable dower' was one-third of the freehold of which the husband was seised on the day of the espousals. Now, however, it was one-third of all that had been the husband's in *his life time* in fee simple or fee tail. In (3) also there had been a change, for when Bracton wrote it was limited to one-third, but now the whole of the husband's realty might be included. Of the last—dower de la plus belle—Littleton says, "And this is in case where a man is seised of forty acres of land and he holdeth twenty acres of the said forty acres of one by knight's service and the other twenty acres of another in socage, and taketh wife and hath issue a son and dieth, his son being within the age of fourteen years; and the lord of whom the land is holden by knight's service entereth into the twenty acres holden of him and holdeth them as guardian in chivalry during the nonage of the infant, and the mother of the infant entereth into the residue and occupieth it as guardian in socage; if in this case the wife bringeth a writ of dower against the guardian in chivalry, to be endowed of the tenements holden in knight's service, in the king's court or other court, the guardian in chivalry may plead in such case all this matter and show how the wife is guardian in socage, as aforesaid, and pray that it may be adjudged by the court, that the wife may endow herself *de la plus belle*, i.e. of the most fair of the tenements that she hath as guardian in socage, after the value of the third part that she claims by her writ of dower to have the tenements holden by knight's service. And if the wife cannot gainsay this, then the judgment shall be given, that the guardian in chivalry shall hold the lands holden of him during the nonage of the infant, quit from the woman etc. And note that after such a judgment given, the wife may take her neighbours and in their presence endow herself, by metes and bounds, of the fairest part of the tenements that she hath as guardian in socage, to

[1] See p. 50.

have and to hold to her for term of her life; and this dower is called dower de la plus belle[1]."

In Littleton's time a doweress might dispose of her land and bind her heir by warranty[2]. This power, however, was taken from her by Statute 11 Hen. VII. c. 10, and from that date such warranty was void. Dower could be barred by the husband and wife joining in a fine or in suffering a common recovery.

Curtesy.

Tenancy by curtesy remained just as in the preceding period, with a few additions due to the introduction of the estate tail. The husband had a life interest in the lands that his wife held whether in fee simple, or fee tail, or fee tail special, provided, however, in the last case, that "the husband have issue by the same wife, male or female born alive, although this issue may afterwards die[3]." "And some have said that he shall not be tenant by the curtesy unless the child that he hath by his wife be heard to cry; for by the cry it is proved that the child was born alive. Therefore quaere[4]." A similar view had been expressed at an earlier period[5], but it was afterwards established that the cry was important merely as evidence of the infant being alive, and that other evidence might be entertained, "for peradventure," says Coke, "the infant might be born dumbe."

We have seen that the husband had only a life interest in his wife's lands. However, before the Statute of Glocester a tenant by the curtesy might alienate in fee and bind his heir by warranty. After that statute he could no longer do this, unless the heir got assets by descent from the tenant by the curtesy[6]. At the same time it should be remarked that the courts were not so strict in requiring a bonâ fide recompense to the issue of a tenant by the curtesy as to that of a tenant in tail[7].

[1] Littleton, I. 5, §§ 48 and 49.
[2] Ibid. III. 13. 725.
[3] Ibid. I. 4. 35.
[4] Ibid. § 35.
[5] See Bracton, v. 5. 30; Britton, c. 50, f. 132; Fleta, VI. c. 50.
[6] Littleton, III. 13. 724.
[7] Reeves, II. 340.

Title by descent.

Passing from methods of conveyance inter vivos, we need hardly remark that title by descent was an exceedingly common one, both fee simple and fee tail being essentially heritable estates. The actual laws of descent are discussed at length by Littleton[1], but they need not occupy us here. In the case of a fee tail the course of descent depended on the form of the gift—tail general, or special, male or female. "In cases of gifts in tail" says Littleton "the will of the donor ought to be observed, who ought to inherit and who not[2]." After giving various examples of descent[3], he makes the important remark "But if a man gives lands or tenements to another, to have and to hold to him and to his heirs male, or to his heirs female, he to whom such a gift is made hath a fee *simple*, because it is not limited by the gift of what body the issue male or female shall be and so cannot in any wise be taken by the equity of the said statute, and therefore he hath a fee simple[4]." In speaking of the law in the preceding period we had frequently to dwell on the importance of seisin. This receives many illustrations also in the period now under discussion. Thus, in the matter of descents, "If a man be seised of certain lands in fee and hath issue two sons and the elder is a bastard and the younger mulier (i.e. legitimate) and the father dies and the bastard entereth claiming as heir to his father and *occupieth* the land all his life, without any entry made upon him by the mulier, and the bastard hath issue and dieth seised of such estate in fee and the land descend to his issue and his issue entereth etc.; in this case the mulier is without remedy, for he may not enter, nor have any action to recover the land, because there is an ancient law[5] in this case used

Importance of seisin.

[1] Littleton, I. 1, §§ 2—9. Just as in Bracton's time the ordinary rules were sometimes set aside by special custom, as that of gavelkind or Borough English. See Littleton, II. 10. 165.

[2] Ibid. I. 2. 22.

[3] Ibid. §§ 23—30.

[4] Ibid. § 31.

[5] See the discussion of 'legitimacy' in the last period, p. 48.

etc.[1]" It would be quite otherwise if the mulier disseised the bastard, as the latter could then have no claim[2].

As yet there was no such thing as a proper will of lands, except, as before, in the case of special custom such as existed in many boroughs[3]. Something will be said as to the practical method of avoiding the restraints on devising realty when we deal with 'uses' during this period. Wills.

We must next refer to title by occupancy, a title that is of interest mainly because it used to be spoken of as the original and 'natural' title. This position would scarcely be maintained to-day[4], and although Blackstone adopts it, he does not fail to point out that the title has been confined by English law within a very narrow compass[5]. Within historic times, at any rate, it operated only in the case of an estate pur autre vie. Thus suppose that *A* were tenant pur autre vie, *B* being cestui que vie. In the event of *A* dying before *B*, there were two possibilities. In the first place, if *A*'s estate had been limited to *A* without mention of his heirs, then anyone might enter on the land, and the first person to do so became entitled to the estate during the life of *B* and was called a 'general' [and sometimes a 'common'] occupant. If, on the other hand, *A*'s estate had been limited to him and *his heirs*, then there was no room for the play of occupancy, although the name 'special occupant' was given to the heir in such circumstances. The case, then, of a general occupant was the only example of occupancy, properly so called, known to English law, and even this did not exist for very long. For Bracton tells us nothing of occupancy[6] and we shall Occupancy.

[1] Littleton, III. 6. 399. [2] Ibid. § 401.

[3] See Littleton, II. 10. 167. Litigation concerning wills began to be common in the reign of Edward III. and soon the rule was established that every effort should be made to give effect to the *intention* of the devisor, however untechnically it might be expressed.

[4] See Maine, *Ancient Law*, Chap. VIII. [5] Blackstone, *Comm.* II. c. 16.

[6] In his day the estate reverted to the grantor on the death of the tenant pur autre vie.

hear its death knell in the Statute of Frauds at the beginning of the next period. It should be noted that there could be no occupant against the king, since "nullum tempus occurrit regi," and also that the law as to general occupancy did not apply to incorporeals nor to copyholds.

Incorporeals.

In the last period we devoted a special chapter to the discussion of incorporeals and villeinage; but the law on these subjects experienced so few important changes in the interval that in this period it may be considered much more briefly.

Seignory.

As to a seignory, there is practically nothing to be added to Bracton's account. The regular method of conveyance inter vivos was by deed of grant with attornment of the tenant, the attornment being accomplished either by word of mouth or by delivery to the grantee of "a penny, halfpenny or farthing[1]." A fine or common recovery might also be employed. Descent was, however, by far the most common title and it should be added that the rules of dower and curtesy applied.

Rents.

In dealing with rents, Littleton makes a triple division—rent service, rent charge, and rent seck[2]. By virtue of the statute 'quia emptores' rent service could be reserved only by one who had the reversion; but a deed was not essential to the reservation. Rent charge was established by the grant (by deed, poll or indenture) of an annual rent issuing out of certain lands, and could be granted in fee simple, fee tail, for term of life etc.[3] To complete the transfer the tenant of the land charged should attorn to the grantee[4].

It should be observed that the donee of a rent charge lost it entirely if he purchased the whole or *part* of the land out of which the charge issued—"because the rent charge cannot be apportioned[5]." Further, if *A* leased

[1] Littleton, III. 10. 551.

[2] Ibid. II. 11. 213.

[3] Ibid. § 218.

[4] Ibid. III. 10. 556. In the case of joint-tenants, the attornment of one sufficed for all. See Littleton, III. 10. 566.

[5] Littleton, II. 11. 222. This was not the case with rent service.

lands to *B* for a term of years, or life, or made a gift in tail, reserving a certain rent, and afterwards granted his reversion to *C* (and *B* attorned), then the rent passed with the reversion although no mention of the rent had been made[1].

Rents could also be conveyed by means of a fine or common recovery. Just as in the preceding period, a prescriptive title was one of the most common. The time of prescription was the time "whereof there is no memory of man to the contrary." This time could not be presumed to run beyond the limit of *legal* memory, and this, as we have seen, was finally fixed[2] at the beginning of the reign of Richard I. In other respects the rules as to prescription were unaltered since Bracton's day. Just as then, too, actual seisin was of the first importance in establishing a claim to rents. Thus if a lord granted the rent of his tenant by deed to another and the tenant attorned—"If the rent be denied him [the grantee] at the next day of payment, he hath no remedy, because he had not thereof any possession. But if the tenant, when he attorneth to the grantee or afterwards, will give a penny or a halfpenny to the grantee in the name of seisin of the rent, then if after at the next day of payment the rent be denied him, he shall have an assize of novel disseisin[3]."

Advowsons.

Advowsons were discussed at some length in the preceding period and there is little to be added here. Of course some novelties attended the introduction of strict estates tail by the Statute de Donis, and the method of avoiding that statute by means of common recoveries was applied in due time to advowsons as well as to other forms of real estate. It should be noted also that it was in the present period that the legislature interfered to secure the proper payment and endowment of vicars—i.e. those endowed in the place of rectors in cases of appropriations. The matter was dealt with by

[1] "Not however e converso." Littleton.

[2] By Stat. West. I., see p. 106.

[3] Littleton, II. 12. 235.

Statutes 15 Rich. II. c. 6 and 4 Hen. IV. c. 12, and this may be taken as the time when vicarages became known to the law. The advowsons of these vicarages belonged originally to the owners of the rectories; and in the first instance they were appendant to these rectories, but as time went on they were frequently severed and became advowsons in gross.

Commons.

Our last survey of commons[1] carried us across the borders of the present period and left little need for further comment. We saw reason for believing that the distinction between common appendant and common appurtenant is a venerable one, but after what Mr Scrutton has shown us from the Year Books[2] we can have little doubt that the *name* 'common appendant' is not much older than Littleton.

Copyhold.

Turning from the freehold to the copyhold we find that the actual rules that regulated dealings with this class of tenure had undergone little change since Bracton wrote on villeinage. In the interim, however, there had been a natural tendency to stereotype the customs of the different manors, and in this way the copyholder—as he was now called—was rendered more secure and free from arbitrary interference on the part of the lord. And, in addition to this, an important step was taken about Littleton's time when the *common law* courts began to recognise and to enforce the customs of the different manors. It was generally said, says Littleton, that copyholders were but tenants at the will of the lord according to the custom of the manor. "But the lord cannot break the custom that is reasonable in these cases. Brian, C. J., said that his opinion hath always been and ever shall be that if such tenant by custom paying his services be ejected by the lord, he *shall have an action of trespass* against him—H. 21 Ed. 4[3]. And so was the opinion of Danby, C. J., in 7 Ed. 4[4]. For he says that

[1] See pp. 62 et seq.

[2] Scrutton, *Commons and Common Fields*.

[3] Y. B. 21 Ed. IV. 80, pl. 27. [4] Y. B. 7 Ed. IV. 18, pl. 16.

tenant by the custom is as well inheritor to have his land according to the custom as he that has a freehold at the common law[1]."

The various kinds of estates that could be created in copyhold land, and all the incidents of tenure, the various dues, the mode of descent, methods of alienation, rules as to freebench and curtesy[2], rights of common and the like were all, as we have seen, matters to be settled by reference to custom as evidenced by the court rolls of the manor. A short reference to the customs as to estates tail is all that need be added to the description given in the preceding period. We have seen that for a long time it was possible to give an estate to a man and the heirs of his body, but that before the Statute de Donis this was really but a fee simple conditional on the birth of issue. The Statute de Donis was intended to put an end to this state of affairs and, as we have noticed, it did so until the method of barring entails by means of a common recovery was invented. The laws of copyhold tenure, however, were regulated entirely by custom and so were not affected by the Statute de Donis. Now in some manors there was no custom to entail, and in these the copyholder was in a position like that of the holder of a fee simple conditional to which we have referred above. But in other manors there was a custom to entail, and where this existed the estate descended to the customary heir, and the tenant in tail was powerless to alienate. However, the benefits to be derived from greater freedom of alienation were as obvious to the copyholder as to the freeholder, and in course of time he too invented methods of avoiding the restrictions. To effect this different plans were adopted in different manors. In some an ordinary conveyance by surrender was a sufficient bar to the entail; in others it was necessary for the tenant to forfeit his land to the lord,

[1] Littleton, I. 10. 77.

[2] When freebench and curtesy obtained they were complete without the formality of 'admittance.'

who by a preconcerted agreement regranted it in fee simple; while a third, and very common, plan was to follow the analogy of the procedure with a freehold estate and suffer a 'customary' recovery.

Equity

So far we have been looking at our subject only from one point of view—the common law. Now, however, a period has been reached in which some of the doctrines of equity are forced upon our notice. Towards the end of the fourteenth century the chancellor took to enforcing *uses*. Feoffments to uses had been made long before this; but they were enforced merely by moral sanctions. When in that condition they lay outside the domain of the lawyer, but the chancellor's intervention changed all that. Henceforth they must be regarded as strictly within the limits of legal institutions.

Equitable estate—what?

We must see then in what way the equitable doctrine of uses affected the subject of title. Suppose that *A* enfeoffed *B* of certain lands, *B* being seised to the use of *C* (the 'cestui que use' as he was called). It would commonly be said that *B* is the 'legal owner' and *C* the 'equitable owner' of the estate. This is, however, a somewhat confusing way of describing the position, for it suggests a conflict between rival owners and, of course, there is no such conflict. *B* is undoubtedly the legal owner of the estate—all courts (legal or equitable) will recognise him as such. But disputes as to his title will not be entertained by the courts of equity. Such matters will be left to the 'common law' courts, and these will insist on a title and evidence of title such as have been discussed at length in the pages above. *B*, however, though unquestionably the owner of the land, is hemmed in by restrictions. He is bound to use the property in the particular way laid down when the estate was conferred on him. He is seised *to the use of C* and must, as a rule, do with his property as *C* may direct. Should

he attempt to do otherwise, the common law courts will not interfere, but the chancellor will come down with a strong arm and insist on the trust being fulfilled. *C* then has all the benefits that flow from ownership, although the courts do not recognise him as *owner* at all. He is said to have an 'equitable estate.'

How then could this equitable estate be acquired? The usual method was for *A* to convey the legal estate to *B* by any of the ordinary modes of conveyance—feoffment, fine, recovery etc.—and to declare that *B* was to be seised to the use of *C*. No formalities, however, were required for the creation of this use; writing was not necessary, mere word of mouth was quite sufficient and any words that clearly expressed *A*'s intention would do. Even if no such words were employed an equitable estate was sometimes created by '*implication*.' This happened if *A* made his conveyance to *B* without any consideration either of blood or money. Equity interpreted this to mean that *A* intended the beneficial ownership to remain in himself. *B* was therefore regarded as a mere trustee for *A* and the use was said to *result* to *A*[1]. Creation of equitable estate.

Moreover an equitable estate could be created without any legal (common law) conveyance at all. *A* could himself become trustee for *C*, without the intervention of *B*, and this could be done in two ways:—(1) By a covenant to stand seised—if *A* affirmed that in future he would hold his property to the use of his son, brother, nephew or cousin. (2) By a bargain and sale—if *A* entered into an agreement with *C* for the sale of his estate and *C* paid or promised to pay the purchase money; from that moment Equity regarded *C* as having an equitable estate in *A*'s land, although no legal conveyance had yet been made.

One very important consequence of the doctrine of uses was that a power of devising lands was acquired Wills.

[1] The doctrine of resulting uses did not apply to a grant to *B* of a *life* estate—it held only in case of a fee simple or fee tail.

and was constantly employed. Thus *A* might convey his land to *B* and his heirs to *the uses declared by A's will.* Then, in his will, *A* would declare a use in favour of *C*, and until this operated the use resulted to *A*; but after *A*'s death Equity would compel *B* to hold the land to *C*'s use. Moreover it is to be noted that no formalities were requisite for the validity of such a will. The preamble[1] to the Statute of Uses tells us that wills were "sometimes made by nude parolx and words, sometimes by signs and tokens, and sometimes by writing." And we have only to look at the Calendar of Proceedings in Chancery to find many striking illustrations of the informal character of the wills in these days. Thus in the time of Henry VI. we have the case of *William of Arundel v. Sir Maurice Berkeley.* The Bill complains that the plaintiff's father enfeoffed certain persons in various manors to the intent that they should perform his will and that he subsequently settled these estates by deed on the plaintiff and the heirs of his body. After his death his eldest son took possession of the manors and enfeoffed the defendant in the same to the intent that he should perform his will, which, *by letter addressed to Lady Arundell, his mother,* he declared to be "that a state shoulde be made to the seid besecher his brother, yn all the said manors and office, according to the wille of his seid fader, yn the most surest wyse[2]." Here is an account from about the same time, of a will made by mere word of mouth by one Robert Crody. The night before his death he called two friends John Gover and Thomas Attemore to his bedside "sayng to theym in this maner:—'Sires ye be the men in whom I have grete trust afore moche other persones and in especial that suche will als I shall declare you atte this tyme, for my full and last will, shall through your gude help by oure Lordes mercy be perfourmed; wherefore I late you have full knowlich, that this house which

[1] Not a very trustworthy authority on some matters, but reliable enough here.

[2] *Calendar of Proceedings in Chancery*, I. XXXV.

I ly in, and all myn other londes and tenements in this towne, I yeve and graunte to you, to holde to you your heires and your assignes, to this entent that after myn deces, ze shall make estate of the same house, londes and tenements to Alice my wyfe for terme of hir lyve, so that after hir deth thay remayne to Margarete my doghter, and to the heires of hir body comying, that then they remayne to my right heires for evermore. And to the entent that this my last will mowe be performed by you, als my trust is that it shall be, her atte this tyme I delyver you possession of this house in the name of all my londes and tenements afore especified, also holy and entirely als they wer ever myn atte any tyme.' By force whereof the forseide John and Thomas wer possessyd of the house, landes, and tenements aforeseide in thaire demesne also of fee, and of the same house, londes and tenements made estate to the saide Alice, after the deth of hir saide husband, according to the entent and will afore declared[1]."

Future estates.

Another result of the equitable doctrines was the enlarged power that men acquired of fixing the devolution of their estates in the future. At the common law the only future estates known were the remainder and the analogous reversion[2]. Equitable estates however had no such narrow limits. They could be made to spring up at any future time and the rules as to their construction shaped at a later time had an important influence on the development of conveyancing forms.

Transfer of equitable estates.

So far we have spoken of the creation of equitable estates. It remains to add that, once created, these estates could be transferred according to the direction of the cestui que use without any formality whatever—a mere expression of intention to the feoffee to uses being sufficient. In fact in this department we find no trace of the common law respect for open and notorious transfer of possession. If the feoffee to uses failed to act according

[1] *Calendar of Proceedings in Chancery*, I. xliii.

[2] See p. 124.

to the directions of cestui que use, the latter had only to appeal to the Chancellor, and we have numerous records of such appeals[1]. Here is one from the reign of Edward IV.

John Clyfford v. William Apulderfeld. "To the right reverent fader in God the Bisshop of Lincoln and Chauncellor of England. Mekely besecheth your good lordship your contynuell oratour William Clyfford squyer, that where as John Clyfford squyer, his fader, among other landes and tenements beyng seased of the maner of Kemsle with the appurtenances CCC. acres of londe and mersshe and a water mille called South Mille with the appurtenances in the hundred of Middleton in the counte of Kent, in his demesne as of fee and so seased of grete trust and confidence thereof enfeoffed Walter Langley, William Norton, and John Huse squyers, nowe dede, and William Apulderfeld yet a lyve, to have to theym and to theire heires for ever to thuse and behouf of the seide John Clyfford and Alice his wyf and theires of their ij bodyes lawfully begoten: by force of the which the seide William Apulderfeld and his cofeffees of the said maner, lande, mersshe, and mille with the appurtenances were seased in their demesne as of fee to thuse and behouf abovesaid, and after that, the seide John Clyfford and Alice hadde issue betwene theym, your seide oratour and dyed; after whos deth your seide oratour ofte tymes hath requyred the seide William Apulderfeld to make estate to hym in fee, of the seide maner, lande, mersshe, and mille with the appurtenances and he that to do at all times hath refused and yet refuseth ageyn all right and conscience and contrarie to thentent of the seid feffement. Please it therefore your gracious lordship the premysses considered to graunte a writte of sub poena to be direct to the seide William Apulderfeld comandying hym by the same to appere affore our soveraigne lord the Kyng in his Chauncerye

[1] See e.g. *Calendar*, I. lvii., lxii., xc., xciv., cv., cxii., cxv., cxvi., cxxiv.

at a certeyn day and under a certeyne payne by your good lordship to be lymytted, there to answer unto the premisses and to do and resceyve as by your good lordship shall be thought resonable, for the love of God and in the wey of charite[1]."

In 1483 the legislature declared that conveyances of cestui que use were good without the assent of the feoffees[2].

'Equity follows the law.'

In almost all respects 'equity followed the law' as to the devolution of estates. However, there was no dower or curtesy of an equitable estate, a fact that is emphasised in the preamble to the Statute of Uses, which also points out that there was no escheat to the lord on failure of heirs, nor forfeiture to the king in case of felony. A very important point not yet noted was that lands might be held to the use of a married woman. At the same time it must be observed that a married woman had not during the coverture the same freedom in alienating her estate as a 'feme sole,' and it was regarded as a breach of trust for the trustee to agree to any joint request of husband and wife for the disposition of the wife's equitable estate[3].

Married women.

[1] *Calendar*, I. cv.

[2] Stat. 1 Rich. III. c. 1. A century before this—in 1377—uses had been made liable to be taken in execution for debt. Stat. 50 Ed. III. c. 6.

[3] See e.g. Y. B. 7 Ed. IV. 14. 8; and 18 Ed. IV. 11. 4.

CHAPTER VII.

FOURTH PERIOD. FROM HENRY VIII. TO WILLIAM IV.

(STATUTE OF USES TO THE PRESCRIPTION ACT.)

(1535—1832.)

In the last chapter we sketched somewhat rapidly the changes introduced into the legal system after Bracton—changes that were due mainly to the legislative activity under Edward the First and later to the rise of the Chancellor's jurisdiction. We must now turn to the famous Statute of Uses and see in what way it affected the development of our subject. The section most important for present purposes is this:—

Statute of Uses.

"Where any person or persons stand or be seised or at any time hereafter shall happen to be seised of and in any castles, honours, manors, lands, tenements, rents, services, reversions, remainders, or other hereditaments to the use confidence or trust of any other person or persons, or of any body politick, by reason of any bargain, sale, feoffment, fine, recovery, covenant, contract, agreement, will or otherwise by any manner of means whatever it be; that in every such case, all and every such person and persons, and bodies politick, that have or hereafter shall have any such use, confidence, or trust, in fee simple, fee tail, for term of life, or for years, or otherwise; or any use, confidence, or trust, in remainder, or reverter, shall from henceforth stand and be seised, deemed, and adjudged in lawful seisin, estate, and

possession of and in the same honours, castles, manors, lands, tenements, rents, services, reversions, remainders, and hereditaments, with their appurtenances, to all intents, constructions, and purposes in the law, of and in such like estates, as they had or shall have in use, trust, or confidence of or in the same; and that the estate, title, right, and possession that was in such person or persons that were or hereafter shall be seised of any lands, tenements, or hereditaments, to the use, confidence, or trust of any such person or persons, or of any body politick, be from henceforth clearly deemed and adjudged to be in him or them that have, or hereafter shall have such use, confidence, or trust, after such quality manner, form and condition as they had before in or to the use confidence or trust that was in them[1]."

Effect of statute on modes of dealing with legal estates.

Three important effects of this statute on the methods of dealing with legal estates should be observed. (*a*) It introduced two new modes of conveying a freehold. (*b*) It enabled one to make certain limitations of the legal estate which had been impossible before. (*c*) It abolished the power of devising a use. Each of these must be examined separately.

Bargain and Sale raised in level.

(*a*) In the first place a Bargain and Sale was now raised to the level of the older methods of conveyance, like the feoffment with livery of seisin. And there was nothing in the statute that required any special formality about the bargain, it need not even be in writing. This however was provided for by a statute of the same year (the Statute of Enrolments 1535) which declared that every bargain and sale "of an estate of inheritance or freehold," that was to operate as a conveyance under the Statute of Uses,

Statute of Enrolments.

"should be made *by writing indented, sealed, and enrolled* in one of the King's Courts of Record at Westminster, or else within the same county or counties where the manors,

[1] Stat. 27 Hen. VIII. c. 10. It should be noted that the statute speaks of one person *seised* to the use of *another person*. Thus it does not operate where there is an active trust to perform and it has nothing to do with copyholds.

lands, or tenements so bargained and sold lie or be, before the Custos Rotulorum and two Justices of the Peace and the Clerk of the Peace of the same county or counties or two of them at the least, whereof the Clerk of the Peace to be one; and the same enrolment to be had and made *within six months* next after the date of the same writings indented[1]."

Did not affect bargain and sale of term of years.

It is most important to notice that this statute has nothing to say about bargains and sales of *terms of years*. And it may be remarked, in passing, that it is a mistake to suppose, as is often done, that the Statute of Uses has nothing to do with terms of years. It is true that that statute does not affect the conveyance of a leasehold when once that has been created, but it frequently operates in its creation. Thus suppose *A* (tenant in fee simple) is declared to be seised to the use of *B* for a term of years, then by virtue of the Statute of Uses *B* is deemed to be in lawful *possession* of the estate for the term of years. Or—to put a slightly different case that touches us more nearly at the present—suppose *A* (tenant in fee simple) bargains and sales land to *B* for a year. The Statute of Uses operates in spite of the Statute of Enrolments, for the latter does not apply to leaseholds. Thus *B* is deemed in lawful possession of the land for the term of years. Now it has been seen that the legal estate —fee simple, or fee tail, or term of life—can be conveyed to a tenant for years in *possession*, by means of a release.

New mode of acquiring a freehold.

In this way we have an important new mode of acquiring a freehold due to the operation of the Statute of Uses. One great result of that enactment was to obviate the necessity of actual possession on the part of the donee when a conveyance was to be made. For, by utilising the statute, the donee was *deemed* to be in possession without actually being so. This new means of transferring property by bargain and sale for a year followed by a release was viewed with some suspicion at first; but it was placed on a firm footing by the decision in *Lutwidge*

[1] Stat. 27 Hen. VIII. c. 16.

v. Mitton[1] in the eighteenth year of the reign of James I. and from that time till the reforming statutes of the present reign it remained the regular mode of conveyance inter vivos.

So much for the Bargain and Sale—but this was not alone in being raised by the Statute of Uses to the level of the older methods of conveying realty. The covenant to stand seised received a similar treatment and will occupy our attention later[2].

Covenant to stand seised.

(*b*) It has been remarked that before the Statute of Uses the Chancellor had countenanced the creation of equitable estates that might arise at a future time and be subject from the beginning to a law of variation quite unknown to the common law. These future and shifting uses were now brought within the cognizance of the ordinary law courts by the operation of the Statute of Uses which identified the 'legal' with the 'beneficial' owner. It would be foreign to our purpose to enter into a discussion of the various rules that grew up as to these future uses. In the present essay we are concerned only with the mode of their formation and alienation.

Future and shifting uses now brought within sphere of 'law.'

Closely allied to the operation of these future uses is the means of conveyance by the creation of powers of appointment. Thus *A* conveys (by any of the recognised common law modes) his land to *B*, and at the same time declares that it is to be held to such uses as *C* shall appoint by an expression of his will in proper form. If then *C* exercise this power in proper form [and the courts are very strict as to the terms of the power being complied with] in favour of *D*, then this constitutes a legal conveyance from *A* to *D*. Before the Statute of Uses *B* would have been the legal owner and *D* would have had only an equitable estate; but by virtue of the statute *D* is deemed to be in lawful seisin etc.

(*c*) The third effect of the Statute of Uses to which special attention is to be directed was that it abolished

[1] Croke's *Reports*, James, 604.

[2] See p. 162.

Effect of Statute of Uses on Wills.

the power of disposing of land by will, a power that had, as we have seen, grown up and developed under the patronage of the Chancellor.

The death knell of wills was listened to, however, with great dissatisfaction. Like most of the provisions of this famous statute, it had been forced upon an unwilling people by a powerful and unscrupulous king aided by a subservient parliament. The country had other reasons too for showing signs of uneasiness and at length rebellion broke out. One of the grievances alleged in the Pilgrimage of Grace was that one could no longer make provision by will for his wife and younger sons. It was thought well to remove this source of disaffection and so, in 1540, the Wills Act was passed. This, with the explanatory act of 1542, gave every tenant in fee simple the power of devising all his lands held in socage tenure and two-thirds of that held by knight-service. The first section of the act of 1540 declares:—

Wills Act, 1540.

"That all and every person and persons having or which hereafter shall have any manors, lands, tenements, or hereditaments holden in socage, or of the nature of socage tenure, and not having any manors, lands, tenements or hereditaments holden of the King our sovereign Lord by knight-service, by socage tenure in chief, or of the nature of socage tenure in chief, nor of any other person or persons by knight-service from the twentieth day of July in the year of our Lord MDXL. shall have full and free liberty, power and authority to give, dispose, will, and devise, as well by his last will and testament in *writing*, or otherwise by any act or acts lawfully executed in his life, all his said manors, lands, tenements, or hereditaments, or any of them, at his free will and pleasure; any law, statute, or other thing heretofore had, made, or used, to the contrary notwithstanding."

And in the fourth section:

"it is further enacted by the authority aforesaid, that all and singular person and persons having any manors, lands, tenements or hereditaments of estate of inheritance holden

of the King's Highness in chief by knight-service, or of the nature of knight-service, from the said twentieth day of July, shall have full power and authority by his last will by writing or otherwise by any act or acts lawfully executed in his life to give, dispose, will, or assign *two parts* of the same manors, lands, tenements, or hereditaments, in three parts to be divided, or else as much of the said manors, lands, tenements, or hereditaments as shall extend or amount to the yearly value of two parts of the same in three parts to be divided, in certainty and by special divisions as it may be known in severalty, to and for the advancement of his wife, preferment of his children, and payment of his debts or otherwise at his will and pleasure; any law, statute, custom or other thing to the contrary thereof notwithstanding[1]."

Explanatory act of 1542.

The act of 1542 explains that the former act applies to a person or persons having a sole interest or interest in fee simple, or seised in fee simple, or coparcenary, or in common in fee simple in possession, reversion, or remainder. It proceeds to state that the devise may be made "to any person or persons, *except bodies politick and corporate.*" Further it declares void all wills made "by any woman covert, or person within the age of twenty-one years, idiot, or of any person de non sane memory[2]."

No special formality required for a will.

It will have been observed that these enactments require no special formality for the execution of a valid will. Even the provision as to writing is somewhat loosely worded, "as well by his last will and testament in writing or otherwise by any act or acts lawfully executed in his life"—and as a matter of fact bare notes in the handwriting of *another* person were allowed to be good wills within the statute.

We have now reviewed the epoch-making legislation of the reign of Henry VIII. in so far as it bears on title, and have seen how profoundly it affected that subject. Its influence on the creation and transfer of equitable estates will occupy us later[3]. From the close of this

[1] The Act of Wills, etc. 32 Hen. VIII. c. 1.

[2] Stat. 34 and 35 Hen. VIII. c. 5, § 14.

[3] pp. 179 et seq.

period—almost revolutionary in the history of our subject —there were, with one or two exceptions, scarcely any changes of importance till the great reforming period after 1832. What took place in the long interval was but a gradual development of forms under the restraining influence of the courts; there was nothing of the nature of an organic change.

For our purposes by far the most important event in the interim was the passing of the Statute of Frauds in 1677[1]. However we should first mention the famous act abolishing military tenures and turning all into free and common socage. This was passed by the Long Parliament in 1645, confirmed in 1656 and finally enacted in 1660[2]. It is, of course, of first class importance in the general history of realty; but for our purposes is mainly of interest as extending the Wills Acts of 1540 and 1542 so as to give a general power of disposing of freeholds by will—the restriction in the case of tenure in capite being henceforth meaningless.

Military tenures abolished, 1660.

Effect on wills.

Statute of Frauds, 1677.

Turning to the Statute of Frauds, we note that it introduces important changes in the nature of the evidence of title required by law.

§ 1 declares that:

Leases etc. not in writing and properly signed have force of leases at will only.

"from and after the fower and twentyeth day of June which shall be in the yeare of our Lord one thousand six hundred seaventy and seaven all leases, estates, interests of freehold or terms of yeares or any uncertaine interest of in to or out of any messuages, mannours, lands, tenements or hereditaments made or created by livery and seisin onely or by parole and not putt in writeing and signed by the parties soe making or creating the same or their agents thereunto lawfully authorised *by writeing* shall have the force and effect of leases or estates at will onely and shall not either in law or equity be deemed or taken to have any other or greater force or effect, any consideration for makeing any such parole leases or estates or any former law or usage to the contrary notwithstanding."

[1] Stat. 29 Car. II. c. 3. [2] Stat. 12 Car. II. c. 24.

§ 2. "Except neverthelesse all leases not exceeding the terme of three yeares from the making thereof whereupon the rent reserved to the landlord dureing such terme shall amount unto two third parts at the least of the full improved value of the thing demised." Exception.

§ 3. "And moreover that noe leases, estates or interests not being copyhold or customary interest of in or out of any messuages, mannours, lands, tenements or hereditaments shall at any time after the said fower and twenty day of June be assigned, granted or surrendered unlesse it be by deed or note in writeing signed by the party soe assigning granting or surrendering the same or their agents thereunto lawfully authorised by *writing* or by act and operation of law." Deed or writing necessary for assignment of estates not being copyhold.

§ 4 states, among other things, that: No action can be brought upon contract on sale of lands unless written and signed.

"no action shall be brought upon any contract or sale of lands, tenements or hereditaments or any interest therein unless the agreement or some memorandum thereof be in writing and signed by the party to be charged therewith or some other person thereunto by him lawfully authorised[1]."

§ 5 says that wills of land must be in writing and signed by the devisor or some one in his presence and under his direction, and the will must be *attested* and subscribed by three or four *credible* witnesses. Requisites for a valid will.

§§ 7, 8, and 9 are most important in their bearing on title to equitable estates with which we must deal in a special section later. It will be convenient however to give the substance of these sections here.

§ 7 affirms that: Declaration of trust must be evidenced by writing.

"all *declarations or creations* of trusts or confidences of any lands, tenements or hereditaments[2] shall be *manifested and proved* by some writeing signed by the partie who is by law enabled to declare such trust or by his last will in *writeing*, or else shall be utterly void and of none effect."

§ 8 is of the nature of a proviso and saves from the operation of the preceding section those trusts that arise Proviso—in case of trusts arisiug by operation of law.

[1] A *verbal* authority to the agent is sufficient under this section.

[2] This includes copyholds.

"by implication or construction of law." Consequently these need not be expressed in writing.

Grants of trusts must be in writing or by will.

§ 9. "All *grants and assignments* of any trust or confidence shall be in writeing signed by the partie granting or assigning the same [or] by such last will or devise or else shall be utterly void and of none effect."

The tenth section declares that trust estates shall be regarded as assets by descent. The only other section that need be mentioned is the twelfth, which did away with title by 'general' occupancy. It enacted that the owner of an estate pur autre vie might dispose thereof by his will; that, if no such disposition were made, the heir as occupant should be charged with the ancestor's debts; or, if there were no such 'special' occupant, the estate should go to the executors or administrators, and be subject to the payment of debts.

Review of various titles.

After this survey of the legislation of the period we must proceed to the consideration of the various titles. With the important exception to which attention has been called when the statutes were discussed, we have not to chronicle many changes from the state of affairs in the preceding period. However we may take the opportunity of directing attention to some points too little emphasised before.

Feoffment.

As to modes of conveyance inter vivos, a feoffment "the most antient, the most solemn and public, and therefore the most easily remembered and proved[1]" was still a formal, valid, and effective method of transfer; but it was little used owing to the growing popularity of the newer mode by lease and release. A charter of feoffment was usual, but, until the Statute of Frauds, not essential to the validity of the transfer[2]. Livery of seisin was still the

[1] Blackstone, *Comm.* II. c. 20, p. 310 (13th edit.).

[2] The Statute of Frauds (see above) made writing necessary, but, as yet, a deed was not usually required. To this however there were some exceptions. When the subject of the conveyance was a reversion or an advowson; when the feoffor was a corporation; and in all cases where the livery was done by attorney a deed was necessary.

essence of the conveyance[1] and if either party died before livery of seisin took place the conveyance was void. Livery was either in deed or in law[2], and the ceremonies attending the livery were just as Bracton described them.

"Livery of seisin may and must be made either by the party himself that maketh the estate, or if it be a livery in deed it may, in his absence, be made by his attorney sufficiently authorised by writing[3]."

A livery in law could not be made by attorney[4], and in all cases where the livery was done by attorney a deed of feoffment was required.

Advantages of feoffment.

A conveyance by feoffment with livery of seisin had the advantage over other methods of transfer that:

"it cleareth all wrongful and defeasible titles and reduceth the estate clearly to the feoffee, when the entry of the feoffor is lawful.... And it passeth the present estate of the feoffor, and not only so, but barreth and excludeth him of all present and future right and possibility of right to the thing which is so conveyed; insomuch that if one have divers estates all of them pass by his feoffment; and if he have any interest, rent, common, or the like into or out of the land, it is extinguished and gone by the feoffment. And further, it barreth the feoffor of all collateral benefits touching the land, as condition, power of revocation, writs of error, attaint, and the like; insomuch that if a man make an estate of his land upon condition, or with power to revoke it, and after he make a feoffment of the land; by this he is barred for ever of taking advantage of the condition or power of revocation. It destroyeth contingent uses, gives away a future use inclusively, gives away a seignory inclusively and gives away a right of action; for both the feoffment and livery of seisin incident thereunto are much favoured in law and shall be construed most strongly against the feoffor and in advantage of the feoffee[5]."

[1] Blackstone, *Comm.* II. c. 20, p. 311. [2] Ibid. p. 315.

[3] Sheppard's *Touchstone*, c. 9, vol. I. p. 211. [The real author seems to have been Mr Justice Doderidge.]

[4] Coke on Littleton, f. 52 b; Blackstone II. c. 20, p. 316.

[5] Sheppard's *Touchstone*, c. 9, vol. I. p. 204.

This sweeping character of a feoffment[1] gave it a power that no other mode of conveyance possessed, and occasionally produced strange results. For to make a feoffment good and valid nothing was wanting but possession; hence if a tenant for life or years, or even a mere possessor without any estate in the land, made a feoffment, the feoffee acquired the fee simple. This 'tortious operation' of a feoffment did not always make for justice; but it was generally employed to effect purposes that are now regarded as legitimate, but which could not then be attained otherwise than by this 'tortious' course. Its chief use was to enlarge a long term of years into a fee simple.

Fines.

The only important addition to the law of fines since our last account of it was that made at the beginning of this period by Statute 32 Hen. VIII. c. 36, which declared that:

"a fine levied by any person of full age, to whom, or to whose ancestors, lands have been entailed, shall be a perpetual bar to them and their heirs claiming by force of such entail; unless the fine be levied by a woman after the death of her husband of lands which were, by the gift of him or his ancestors, assigned to her in tail for her jointure; or unless it be of lands entailed by act of parliament or letters patent, and whereof the reversion belongs to the crown[2]."

It should be noted that the judges might refuse permission to certain persons to levy fines.

"Of this sort are madmen, lunatics, villains, idiots, men that have the lethargy, doting old persons that want discretion, drunken men, and men that are forced to it by threatening or the like, also such as are born blind, deaf and dumb[3]."

[1] An illustration of the peculiarly binding character of a feoffment with livery of seisin is seen in the fact that a conveyance made in this way by a lunatic could not be set aside by the man himself on his return to sanity. This was not the case with other assurances: see 1 *Thompson v. Leath*, Comb. 468; *Beverley's case*, 4 Rep. 1236.

[2] Blackstone, II. c. 21, p. 355.

[3] Sheppard, *Touchstone*, c. 2, vol. 1, p. 6—7.

Persons attainted of felony or treason could not levy a fine, and infants were generally refused permission to do so, but if they succeeded in levying the fine it was good against them, unless avoided by writ of error during minority. A married woman ought not to be admitted alone (without her husband) to levy a fine; but a fine so levied was good if not set aside at the husband's instance by writ of error or entry. If a husband levied a fine of lands that he was enjoying in the right of his wife, the latter should join in the fine—otherwise she and her heirs might avoid it within five years after her husband's death. A fine levied by one civilly dead was void. A corporation could adopt this mode of conveyance, except it were an ecclesiastical body restrained from so doing by Act of Parliament.

Passing from fines to recoveries, we observe that they continued to grow in popularity throughout the present period and soon became the regular means of barring an entail[1]. The recovery described before[2] was one 'with a single voucher.' Soon however it was found expedient to have double, treble, or farther vouchers in certain cases, and even in ordinary circumstances a double voucher was preferred to a single one. In case of double voucher the estate was first conveyed to an outsider (*A*) against whom the praecipe was brought; *A* then vouched to warranty the tenant in tail (*B*) and *B* vouched the common vouchee. The object of this procedure was obvious: Recoveries.

"for, if a recovery be had immediately against tenant in tail, it bars only such estate in the premises of which he is then *actually seised*[3]; whereas if the recovery be had against another person and the tenant in tail be vouched, it bars every latent right and interest that he may have in the lands recovered[4]."

[1] For this purpose it was in some ways better than a fine. A fine barred the heir in tail, but not remaindermen nor reversioners—a recovery barred them all.

[2] p. 123.

[3] Piggott, *Recoveries*, 28.

[4] Blackstone, II. c. 21, p. 359.

We have stated that the force of a recovery depended on its power of barring entails and all remainders and reversions expectant on the determination of the estates tail. It remains to point out some limitations to this wide power of barring estates. In the first place, although a common recovery barred a contingent remainder by destroying the particular estate on which it depended, it had no such effect on a springing use or an executory devise[1]. Again, if the estate tail were derived from the king's gift and the remainder and reversion were still in the king, a recovery was no bar of this reversion or remainder[2]. Moreover a widow could not suffer a recovery of lands settled on her by her late husband; and it is important to notice that a tenant for life was restrained by statute[3] from suffering a recovery so as to bar reversions or remaindermen. This point was frequently raised in litigation, for few things were more usual than an attempt to suffer a recovery by a tenant who professed to be tenant in tail but was really only tenant for life.

Private Acts of Parliament.

One form of conveyance by matter of record was common in this period although little heard of before—that was, conveyance by 'private Act of Parliament.' Such acts were not published among the public acts, and although made by the High Court of Parliament itself, and enrolled among the public records, were looked upon as private conveyances. Relief could be obtained against such an act if it could be proved to have been obtained upon fraudulent suggestions[4]; and it could be rendered void if, in the opinion of the court, it was contrary to law and reason[5]. The expedient of a private act seems first to have been resorted to with the object of settling the ownership of realty in cases where the evidence of title was hopelessly entangled. The practice was carried to great length in the reign of Charles II. and became very common again towards the end of the eighteenth century.

[1] Piggott, *Recoveries*, 127.
[2] Stat. 34 and 35 Hen. VIII. c. 20.
[3] Stat. 14 Eliz. c. 8.
[4] *Richardson v. Hamilton* (1733).
[5] 4 Rep. 12.

In the later period most private acts were for the purpose of enclosing waste lands and commons, there being about 4000 of these enclosure acts from the accession of George III. to the end of the present period. A few examples of the titles of these private acts will indicate their character:—

"An act for dividing and inclosing the commons and waste grounds in the manor and parish of Crownthorpe in the county of Norfolk[1]." "An act for dividing, allotting and inclosing the commons and waste lands within the hamlet of Stock and Bradby, in the parish of Fladbury in the County of Worcester[2]." "An act for vesting the Manor, Rectory, and Isle of Hayling in the county of Southampton, part of the settled estate of the Duke of Norfolk, in William Padwick the younger, esquire, his heirs and assigns, and for applying the money thence arising in the purchase of other estates[3]." "An act to enable the trustees of the settled estates of the Right Hon. Charles Henry Cadogan, Earl Cadogan, a Lunatic, to pull down a mansion house, and to sell the materials thereof."

Preston, writing early in the present century, says:

"Few titles are more perplexed than those which depend on allotments under inclosure acts. .....As a rule there is a change of *lands* etc. but not a change of *title*. The title which *A* has to his lands, or common rights, at the time of the allotment or exchange is communicated to the land he receives under the allotments or exchanges; while under a mere private act of exchange between individuals each holds the lands under the title which attached to these lands prior to the exchange[4]."

Royal grants.

A special mode of acquiring realty was by grant from the king, such grants being matters of public record. This method had existed from the earliest times and, as we have seen[5], the oldest conveyances on record were

[1] 17 Geo. III. Pr. c. 1.
[2] 6 Geo. IV. Pr. c. 1.
[3] Ibid. Pr. c. 57.
[4] Preston, *Abstracts of Title* (1818), I. 161—2.
[5] *Ante*, p. 19.

made by grant from the king or by his will. In those days the king could convey away his lands as readily as any one else; but when, in course of time, the Crown became strictly hereditary the lands of the king were looked upon as part of the royal demesne rather than as private property, and they could not be disposed of by will. There was nothing however to prevent the king from granting away his lands during his lifetime, and so frequently was this done, to satisfy the cravings of royal favourites, that the Crown lands were constantly diminishing in spite of the continual income from escheats and forfeitures. In this respect the Stuart kings were specially improvident, and by the time that Anne came to the throne the Crown lands had shrunk to so small a measure that the rent they produced was only a few thousand pounds per annum. To preserve this remnant Parliament interfered and passed an act[1] limiting the king's powers of disposing of Crown lands.

Restraints on alienation.

"Whereas the necessary expences of supporting the Crown, or the greater part of them were formerly defrayed by a land revenue which hath from time to time been impaired and diminished by the grants of former kings and queens of this realm, so that her majesty's land revenues at present can afford very little towards the support of her government"

Absolute grants prohibited.

future absolute grants from the Crown are altogether prohibited. Any grant of Crown lands is to be

What could be granted.

"utterly void and of none effect unless such grant, lease, or assurance be made for some term or estate not exceeding thirty-one years, or three lives, or for some term of years determinable upon one, two, or three lives; and unless such grant, lease, or assurance respectively be made to commence from the date or making thereof; and if such grant, lease, or assurance, be made to take effect in reversion or expectancy, that then the same together with the estate or estates in possession of and in the premises therein contained, do not exceed three lives, or the term of thirty-one years in the whole[2]."

[1] Stat. 1 Anne, c. 7. [2] Ibid. § 5.

In case however the greater part of the estate consisted of buildings, the king or queen might Grant of buildings.

"demise or grant such tenements or hereditaments to any person or persons for any term or estate not exceeding fifty years[1]."

Several later acts also dealt with the disposition of Crown lands. Thus the revenue arising to his Majesty by rents of lands or for fines of leases was, after the death of George II., to be carried to and made part of the general aggregate fund established by 1 George I.[2] The clause in the act of Anne's reign quoted above which allowed a grant for fifty years if the property consisted mainly of buildings was repealed, and the king was permitted to grant land for building purposes for ninety-nine years or three lives in certain cases[3]. By a later act[4] it was declared that none of the restrictions in the above acts were to extend to lands purchased by the king out of his privy purse, or coming to the king from any persons not being kings or queens of the realm[5]. Copyhold lands so purchased were to be vested in trustees appointed by the king, and these trustees were to be admitted to the lands according to the nature of the estate therein and were to be deemed the tenants[6]. Such estates could be dealt with by the king in the same manner as if he were a private person[7]; and early in the reign of George IV. the act first quoted was extended to manors in possession at the accession to the Crown[8]. It will be seen, then, that at this stage of history title by royal grant held a very different position to that in the earlier periods; for now the king had comparatively little to dispose of and even with this he was no longer free to deal. When a royal grant was made, however, it was done by charter or letters patent, usually addressed by the king to all his subjects. The grant was first passed by a bill prepared by the attorney or solicitor-general on

Various later acts.

Purchases by the king out of privy purse.

Form of grant.

[1] Ibid. § 6. [2] Stat. 1 Geo. III. c. I, § 3.
[3] Stat. 34 Geo. III. c. 75. [4] Stat. 39 and 40 Geo. III. c. 88.
[5] Ibid. § 1. [6] Ibid. § 2. [7] Ibid. § 3.
[8] Stat. 4 Geo. IV. c. 18.

receiving a warrant from the Crown. The king's sign manual was then placed at the head of the bill, which was sealed with his privy signet.

In granting away his lands the king had certain advantages over his subjects, for the grant was absolutely void if it appeared from the face of the instrument that the king had been deceived or mistaken as to a matter either of law or fact[1]; and as early as Henry IV.'s time it had been decided that no grant of the king should be valid unless the grantees in their petition for the grant made express mention of the real value of the land[2].

Exchange. The method of conveyance by an exchange of 'equal interests' continued to be used, but its occurrence was much less frequent than at an earlier stage of our history. The main change in the law was that introduced by the Statute of Frauds already cited. From that time onwards writing was necessary if the exchange were of freeholds. It should be remarked that the word 'exchange' was necessary to make the conveyance operative. Hence if *A* conveyed land to *B* by deed and *B* to *A*, without livery of seisin, the transaction was void as a feoffment and it would not be construed as an exchange.

We have already pointed out the necessity for 'equality' in the estates exchanged and also for entry into the things taken in exchange. It should be added that where a reversion, rent or seignory was granted in exchange the attornment of the tenant was required to perfect the title; but, in this case, after such attornment, no entry or claim was necessary to complete the exchange.

We may note further:

"that the things exchanged need not be in esse at the time that the exchange is made; for a man may grant a rent de novo out of his land in exchange for a manor. And yet if I grant to another the manor of *A* for the manor of *B* which he is to have after his father's death by descent, it

[1] E.g. a mis-recital of former grants; a mistake in the statement of the king's title; grant of estate contrary to rules of law.

[2] Stat. I Hen. IV. c. 6.

seems this exchange is void. Further there needs no transmutation of possession; for a release of rent, estovers, or right of land, for land is good. Again the things exchanged need not be of one nature, so long as they concern lands or tenements, for land may be exchanged for rent, common, or any other inheritance that concerns lands or tenements.... But annuities and such like things, which charge the person only, and do not concern lands or tenements, or goods and chattels, cannot be exchanged for land[1]."

As to disabilities—if one of the parties were an infant he could avoid the exchange on reaching his majority. A tenant in tail could make an exchange binding him for life, but his heirs could confirm or avoid it as they pleased. If one of the parties were non sanae memoriae his heir could avoid the conveyance. A man holding in right of his wife could make an exchange that would bind him (and his wife) for his life, but it could be set aside afterwards.

Release.

The next title to consider is the release, which, as explained before, is "a conveyance of right to a person already in possession[2]." Releases of lands or tenements were divided into two great classes:—(1) Those that enured by way of enlargement or passing of an estate, and (2) those that enured by way of passing and extinguishing a right or title only. As to the first (1), these points may be noted:—(*a*) The releasor must have an estate out of which he might release what he professed to do—e.g. if he had the reversion in fee he might release to a tenant for years so as to increase the tenant's estate to one for life or in tail or in fee simple.

"But if there be a lessee for years rendering rent and the reversion is granted for life, the remainder over in fee, and the grantee of the reversion release all his right to him in remainder, and then he in remainder grant the reversion and the tenant for life release to the grantee also—in this case

[1] Sheppard, *Touchstone*, c. 16, vol. 2, p. 294.
[2] Gilbert, *Tenures*, 53.

it seems that both these releases are void and cannot enure as releases[1]."

(*b*) The releasee must have some estate (in possession, or in reversion) in the lands that are the subject of the release. (*c*) There must be some privity in estate between releasor and releasee at the time of making the release. (*d*) The estate that the releasee is to have must be properly marked out and limited.

As to the second class (2)—(*a*) just as before the releasor must have a right to make the release that he proposes to make, he must have more than a possibility of a right; (*b*) the releasee must have the freehold (in deed or in law) in possession, or he must have some estate in reversion or remainder, and this in deed and not merely in right; (*c*) but there is no necessity for privity between the parties; and (*d*), as in the last case, proper words of limitation must be used.

So far we have been dealing with a release of lands and tenements. In the case of a seignory the lord could extinguish all his claims by a release without any special words of inheritance or limitation[2]. Rent charges, and common of pasture, or any profits à prendre issuing out of land, could be released by a release of the land in question, provided the land were the releasor's and he had more than a mere right to it[3]. In the case of joint owners of an advowson, one of them might release to the other—unless the church were vacant at the time.

Confirmation.

Closely allied to a release is a confirmation, of which we gave an example in the last chapter.

"Confirmation," says Gilbert, "is the approbation or assent to an estate *already created*, which, as far as in the confirmor's power, makes it good and valid: so that the confirmation doth not regularly create an estate, but yet such words may

[1] Sheppard's *Touchstone*, c. 19, vol. 2, p. 324. ["Howbeit they may enure as surrenders, if they have words of surrender in them." Ibid.]

[2] Of course by using proper words he may release the seignory only in tail or for life.

[3] As in the case of disseisor.

be mingled in the confirmation as may create and enlarge an estate; but that is by the force of such words as are foreign to the business of confirmation and by their own force and power tend to create the estate[1]."

The confirmation—whether simply to confirm or to enlarge an estate—must be by deed, duly sealed and delivered, and care must be taken that the estate is properly marked out and limited.

Surrender. Surrenders were found in the preceding period; but, whereas at that time they could be made by apt words and express agreements between the parties, now the Statute of Frauds required writing either by the surrenderor or by his agent lawfully authorised by writing [or by act and operation of law][2]. The proviso as to surrenders by operation of law applied to cases such as where a lessee for life (in possession or reversion) took a new lease for years and so drowned the first estate in the second. This was called a surrender in law. As to a surrender in deed, it should be noted that the surrenderor must have an estate in possession and not a mere right to the thing possessed. Further that the surrenderee must have the *next* immediate estate in remainder or reversion; that there must be a privity of estate between the parties; that the surrenderee must have a greater estate than the surrenderor; that the estate must be in his own right and not in that of his wife; and that he must be *solely* seised of this estate in remainder or reversion[3].

The words commonly adopted in a surrender were 'surrender,' 'give,' or 'give up'; but any words that clearly expressed the intention to surrender would do as well. As a rule a deed was not necessary even after the Statute of Frauds; but if the thing to be surrendered were common of pasture, a rent, an advowson, a reversion, or anything that required a deed of grant, then a deed was necessary for its surrender. We should add that the

[1] Gilbert, *Tenures*, 75.

[2] Stat. of Frauds, § 3 [p. 150 above].

[3] Sheppard, *Touchstone*, c. 17, vol. 2, p. 303.

surrender was not perfect until the acceptance and agreement of the surrenderee, but no entry on his part was required.

New modes of conveyance introduced by Statute of Uses.

We have been occupied for a time with a review of various modes of conveyance none of which appears for the first time in the present period. Indeed, with the exception of the novelties introduced by the Statute of Frauds, there has been little to narrate that might not have been put down to the preceding period. Now however we must turn to conveyances the force of which was derived from the provisions of the Statute of Uses. In discussing that statute we took occasion to point out what these methods were and how they operated by force of the statute. Here we must take up the description at the point where it was left off and consider some of the peculiarities of those three means of conveyance—the covenant to stand seised, the bargain and sale, and (most important of all) the lease and release.

Covenant to stand seised.

Taking the covenant to stand seised first, although it was never a common method of transference, it is to be noted that for the validity of the covenant it was necessary that there should be some consideration—either 'valuable,' i.e. of money value, or 'good,' i.e. in consideration of blood or marriage. If the covenant depended on a 'valuable' consideration, then—after the Statute of Enrolments (1535)—it had to be made by deed, indented and enrolled as explained above[1], for in that case it was practically a bargain and sale. However a covenant to stand seised usually rested on a consideration of kinship or marriage, and then there was no need of an enrolled deed. In fact, until the Statute of Frauds, writing was not absolutely essential, although as a matter of practice a deed was commonly employed. After that statute the covenant must be *manifested and proved* by writing[2]; but the writing was required merely as evidence and could be made *after* the covenant.

[1] See p. 143.

[2] Stat. of Frauds, § 7. [See p. 149 above.]

If there were an *express* 'valuable' consideration then a deed indented and enrolled was required, even though the covenant *might* have been founded on a 'good' consideration not requiring any deed. Thus suppose James Smith covenanted to stand seised of land to the use of John Smith (his brother) 'in consideration of one hundred pounds.' This would be void without a deed duly enrolled; whereas if James had covenanted similarly 'in consideration that John is my brother and has paid me £100' no deed would have been required. "Expressum facit cessare tacitum."

Bargain and sale.

Turning to the bargain and sale, we have seen that, to be effective, it must be made by deed, duly indented and enrolled[1]. Further it is to be observed that it was essential to the validity of this title that there should be some valuable consideration, or more strictly that such a consideration should be declared in the deed, although it need not actually have been paid. Enrolment had to be made within six months of the sale, and until this was done the lands etc. remained in the bargainor. The enrolment was on parchment, and by statute 10 Anne, c. 18, § 3, a copy of this enrolment signed by the proper officer having custody of the rolls and proved upon oath to be a true copy,

"shall in all cases where a bargain and sale shall be pleaded with a profert in curia be of the same force and effect as the indenture of bargain and sale should be if the same was produced."

Lease and release.

The method of conveyance by 'lease and release' was described when the Statute of Uses was under discussion, and, as there remarked, when once established, it became the commonest form in practice until the year 1841. Its chief advantages were, (1) that by its means an estate could be transferred without livery of seisin or entry on

[1] See p. 143. By a special proviso, lands in the City of London might be bargained and sold for a consideration by word of mouth without any writing.

the land; and (2) that it did not require enrolment, for the bargain and sale that formed part of the transaction dealt with an estate for years only. On the other hand it had the disadvantage of requiring two instruments for a single conveyance.

After what has been said above[1] we need not delay long over the lease and release. The 'lease' always took the form of a bargain and sale for a year. Such a bargain and sale required 'consideration,' but, as has just been observed, it did not need a deed enrolled. However after the Statute of Frauds writing was essential, and it became the usual practice to employ a deed for a bargain and sale, although this was not absolutely necessary. The Statute of Uses operated to put the bargainee in possession (in the eyes of the law) for the term of years, and the conveyance was then completed by a 'release,' the essentials of which have been considered already and so need not be described again.

Dower and Curtesy.

As to the laws dealing with dower and curtesy, there is little to be added to what we have learned from Bracton and Littleton. Indeed all that we need notice here are two statutes of the reign of Edward VI. The statute 1 Ed. VI. c. 12 enacted that a wife should not (as formerly) be deprived of her dower by the attainder of her husband for misprision of treason or felony. This was not meant to alter the law of attainder for high treason, and by the statute 5 and 6 Ed. VI. c. 11 it was declared that in such a case no dower could be claimed by the wife.

Title by descent.

Little, too, need be said about title by inheritance. The rules of descent were subject to scarcely any alteration, and indeed when Lord Hale first reduced them to a series of canons[2] he stated that they had continued the same for four centuries. However we may note a few changes as to disabilities. It has been said that aliens were incapable of inheriting;

[1] See p. 159.

[2] Hale, *History Com. Law*, 6th edition, p. 318 seq.—followed by Blackstone, *Comm.* II. c. 14.

"but statute 11 and 12 Will. III. c. 6 enacted that all persons being natural-born subjects of the king may inherit and make their titles by descent from any of their ancestors; although their father or mother or other ancestor, by, from, through, or under whom they claim, were born out of the king's allegiance. But inconveniences were afterwards apprehended, in case persons should thereby gain a future capacity to inherit who did not exist at the death of the person last seised.... Wherefore it was provided by statute 25 Geo. II. c. 39, that no right of inheritance shall accrue by virtue of the former statute to any persons whatsoever, unless they are in being and capable of inheriting at the death of the person last seised—with an exception however to the case where lands shall descend to the daughter of an alien; which descent shall be diverted in favour of an after-born brother, or the inheritance be divided with an after-born sister or sisters, according to the usual rule of descents by the common law[1]."

Another question dealt with about the same time was the competency of a Roman Catholic to inherit realty. The statute of 11 and 12 Will. III. c. 4, declared that every such person "who shall not abjure the errors of his religion by taking the oaths to the government and making a declaration against transubstantiation within six months after reaching the age of eighteen shall be incapable of inheriting." The act however was repealed by statute 18 Geo. III. c. 60, which did away with all abjuring of "errors of religion" and required merely an oath of allegiance.

Wills.

Turning next to title by will—we have already drawn attention to the chief statutes bearing upon this subject, the Statute of Wills of 1540 (with the explanatory act of 1542) and later the oft-quoted Statute of Frauds of 1677. As to the form of a valid will, the statute of 1542 required writing; but this was construed very loosely and it was not till 1677 that a more satisfactory state was reached. From that time the will was required to be

[1] Blackstone, *Comm.* II. c. 14.

in writing, and signed by the party making his devise, or by some other person in his presence and by his express directions, and moreover it had to be attested and subscribed in the presence of the devisor by three or four credible witnesses.

Who could not make a will.

The act of 1542 had something to say of persons not capable of making a will. A married woman could not make a will disposing of her lands in the lifetime of her husband, except in special cases, as where the husband had been banished for life by an Act of Parliament. An infant could not devise lands except by special custom, nor could a lunatic unless in his lucid intervals. The will of an idiot, "i.e. such a one as cannot number twenty, or tell what age he is, or the like[1]," was void; but not so that of "one of mean understanding only, that hath grossum caput and is of the middle sort between a wise man and a fool[2]." Void was the testament of an old man in his second childhood, "so forgetful that he hath forgotten his own name." A man *born* deaf and dumb could not make a valid will; but if his infirmity were the result of accident he suffered under no such disability. An alien, a man civilly dead, and a felon were alike in being unable to make a valid testament of lands.

Competency of witnesses.

The competency of the witnesses to a will was a thorny subject that gave rise to endless trouble over devises. After some conflict of opinion it was decided by the Court of King's Bench that a person taking anything under the will was not a credible witness. In the natural course of affairs testators would get some of those they proposed to benefit as witnesses to their wills, and this led to the annulment of many a will. Finally an act was passed in 25 Geo. II. c. 6, "for putting an end to doubts and questions relating to the attestation of wills and codicils concerning real estates." This made a devisee a competent witness to a will; but rendered of no effect the portion of the will which benefited the witness. At the same time a creditor was made a competent witness

[1] Sheppard, *Touchstone*, c. 23. [2] Ibid.

although the will charged the testator's lands with the payment of his debts.

Devisor must be solely seised of an estate in fee-simple.

In a devise of realty the devisor must be *solely* seised of an estate in fee-*simple*. An estate tail could not be devised; nor an estate pur autre vie until the twelfth section of the Statute of Frauds made the change already referred to[1]. A seignory, rent, or reversion could be devised in the same way as land.

Devises to corporations void—except for charitable uses.

It was noted that the Statute of Wills made void all devises to corporations, the object being to prevent gifts in mortmain. However, the rigour of this law was abated by the interpretation put on a statute 43 Eliz. c. 4, which gave validity to devises to a corporation provided they were for charitable uses.

Revocation of a will.

As to the revocation of a will—the will of a woman was revoked by her marriage, and that of a man by his marriage and the birth of a child. A will could also be revoked by deliberately destroying the instrument, whether by the devisor's own hands or in his presence and with his consent. A devise was rendered void if the testator afterwards forfeited his lands for treason or felony, unless they were restored to him on his pardon. The making of a new will destroyed the effect of an earlier one; and if the devisor disposed of his real estate after devising it the will was of no effect even though the property was afterwards reacquired by him.

Occupancy.

The rule as to general occupancy remained as in the preceding period until it was swept away by the twelfth section of the Statute of Frauds. There it was enacted that the tenant pur autre vie might dispose of his estate by will; that, if it were not so devised, the estate should descend to the heir at law and be chargeable with the debts of the ancestor; while if there were no special occupant it should go to the executors or administrators and be chargeable, as before, with the debts of the original tenant pur autre vie during the life of cestui que vie. On this statute a doubt arose as to whether the adminis-

[1] See p. 150.

trator was entitled to the property for his own benefit after payment of all debts of the original tenant. A supplementary act was therefore passed[1] declaring that the surplus of such estate pur autre vie should—after payment of the debts—be distributed as personalty among the next of kin[2].

Bankruptcy.

We have now to discuss a title that had its origin very early in the present period and has since become of considerable practical importance—viz. the title of the Commissioners and assignees in Bankruptcy. We are not required to enter into a discussion of bankruptcy generally—such questions as who may become bankrupt, what is an act of bankruptcy, and the like are clearly outside our province. All that must be done is to consider the title of the Commissioners or assignees and the nature of their estate.

Earliest statute on the subject.

Bankruptcy law dates from the statute 34 and 35 Hen. VIII. c. 4, "An Act against such Persons as do make Bankrupt":

"Whereas divers and sundry Persons craftily obtaining into their Hands great substance of other Men's Goods, do suddenly flee to Parts unknown, or keep their Houses, not minding to pay or restore to any their Creditors their Debts and Duties, but at their own Wills and Pleasures consume the Substance obtained by Credit of other Men, for their own Pleasure and delicate Living, against all Reason, Equity and Good Conscience: Be it therefore enacted by Authority of this present Parliament, That the Lord Chancellor of England, or Keeper of the Great Seal, the Lord Treasurer, the Lord President, Lord Privy Seal, and other of the King's most honourable Privy Council, the chief Justices of either Bench for the Time being, or *three of them at the least*, whereof the Lord Chancellor or Keeper of the Great Seal, Lord Treasurer, Lord President, or the Lord Privy Seal, to be one, upon every Complaint made to them in *Writing*, by any Parties grieved concerning the Premisses, shall have

[1] 14 Geo. II. c. 20.

[2] See note (5) to Coke, Littleton, f. 41 b.

Power and Authority by Virtue of this Act, to take by their Wisdoms and Discretions, such Orders and Directions, as well with the Bodies of such Offenders aforesaid, wheresoever they may be had, or otherwise, as also with their Lands, Tenements, Fees, Annuities, and Offices which they have in Fee-simple, Fee-tail, Term of Life, Term of Years, or in the Right of their Wives, as much as the Interest, Right, and Title of the same Offender shall extend or be, and may then lawfully be departed with, by the said Offender....And to cause their said Lands, Tenements, Fees,...to be searched, viewed, rented, and appraised, and to make Sale of the same Lands, Tenements, Fees...as much as the same Offender may then lawfully give, grant or depart with, or otherwise to order the same for the true Satisfaction and Payment of the said Creditors: That is to say, to every of the said Creditors, a Portion Rate and Rate like according to the Quantity of their Debts. And that every Direction, Order, Bargain, Sale and other Thing done by the said Lords, authorised as is aforesaid, in Writing signed with their Hands, by Authority of this Act, shall be good and effectual in the Law to all Intents, Constructions and Purposes against the said Offenders, their Heirs and Executors for ever, as though the same Order, Direction, Bargain and Sale had been made by the said Offender or Offenders, at his or their own free Will and Liberty, by Writing indented enrolled in any the King's Courts of Record."

Commissioners in bankruptcy—how appointed.

The subject was next dealt with by statute 13 Eliz. c. 7, which, after defining who may become bankrupt, gives authority to the Lord Chancellor or Lord Keeper of the Seal to appoint Commissioners in bankruptcy.

Powers of the Commissioners.

These Commissioners could dispose of the estate of the bankrupt in the same manner as the Lord Chancellor and others mentioned in the act of Hen. VIII. were empowered to do. After payment of the bankrupt's debts, the residue of his property was to be divided into two equal portions, one part

"paid unto the Queen's Majesty, her Heirs and Successors, and the other Moiety thereof shall be by the said Commissioners imployed and distributed to and amongst the Poor

within the Hospitals in every City, Town or County, where any such Bankrupt shall happen to be" [§ 8].

No discharge till all debts paid.

Further it should be noted that there was nothing in the nature of a discharge from bankruptcy until all debts were paid, for § 11 enacts that any real or personal property acquired by the bankrupt after the declaration of his bankruptcy may be disposed of by the Commissioners until the debts are all paid. At the same time, by § 12, any bona fide assurance of the bankrupt made before his bankruptcy was not void unless the parties to whose use the assurance was made "were privy or consenting to the fraudulent Purpose of any such Bankrupt, to deceive his Creditors."

Then, in 1604 [2 Jac. I. c. 15], came another act "for the better relief of the creditors against such as shall become bankrupts":

"For that frauds and deceits, as new diseases, daily increase amongst such as live by buying and selling, to the hindrance of traffick and mutual commerce, and to the general hurt of the realm, by such as wickedly and wilfully become bankrupts,"

it is more clearly explained who may be adjudged a bankrupt; and, what is more important for our purposes, conveyances made by bankrupts are declared void except in special cases, § 5.

Conveyances by bankrupts are void, except in special cases.

"Be it farther enacted that if any person which hereafter is or shall be a bankrupt by intent of this statute, shall convey, or procure, or cause to be conveyed, to any of his children or other person or persons, any manors, lands, tenements, hereditaments, offices, fees, annuities, leases, goods, chattels, or transfer his debts into other men's names, except the same shall be purchased, conveyed or transferred for or upon marriage of any of his or her children, both the parties married being of the years of consent, or some valuable consideration, shall be in the power and authority of the commissioners on this behalf to be appointed, or the more part of them, to bargain, sell, grant, convey, demise, or otherwise to dispose thereof, in as ample manner as if the

said bankrupt had been actually seized or possessed thereof, or the debts were in his own name, of the life estate or interest to his or their own use, at such time as he or she became bankrupt; and that every such grant, bargain, sale, conveyance, and disposition of the said commissioners, or of the greater part of them, shall be good and available to all intents, constructions and purposes in the law, against the offender or offenders, his heirs, executors, administrators and assigns, and such children and persons as shall be subject to this statute, and against all other person and persons claiming by, from or under such offender or offenders, or such said other persons, to whom such conveyance shall be made by the said bankrupt, or by his means or procurement[1]."

Between this time and the reign of George II. a number of Bankruptcy Acts were placed in the Statute-Book, but they have little bearing on the present subject. In 5 Geo. II. c. 30, we come upon a very long act, the main object of which is to protect the creditors from fraud. A few of the sections have an interest for us. § 30 enacts that the Commissioners in bankruptcy may appoint an assignee or assignees of the estate and effects or any part thereof; and

"all the estate and effects of the bankrupt which shall be delivered up or assigned, shall be, to all intents and purposes, as effectually and legally vested in such new assignee or assignees as if the first assignment had been made to him or them by the said commissioners." § 32. "And whereas by reason of the names which are lodged in the hands of assignees until a dividend is made, assignees do oftentimes delay the dividing thereof, to the very great prejudice of the bankrupt's creditors; for preventing whereof, and to the end assignees may make speedy dividends of the estate and effects of such bankrupts, be it enacted by the authority aforesaid, that before the creditors shall proceed to the choice of an

[1] That bankruptcy was regarded as a grave moral offence is evident from the wording of this and several other statutes of the same period. A little later [21 Jac. I. c. xix.] we find an act "for inflicting corporal punishment upon the bankrupts in some special cases."

assignee or assignees of any bankrupt's estate, the major part in value of the said bankrupt's creditors then present shall, if they think fit, direct in what manner, how, with whom and where the monies arising by, and to be received from time to time out of the bankrupt's estate, shall be paid in and remain until the same shall be divided amongst all the creditors as by this act is directed: to which rule and direction every such assignee and assignees, afterwards to be chosen, shall conform, as often as one hundred pounds shall be got in and received from such bankrupt's estate, and shall be and are hereby indemnified for what they shall do in pursuance of such direction of the said creditors as aforesaid."

Bankrupt law consolidated.

All earlier acts dealing with bankruptcy were repealed in 1824 by 5 George IV. c. 98—"An Act to consolidate and amend the Bankrupt Laws." Within a year, however, it was found necessary to repeal this statute, and a new act was passed [6 George IV. c. 16] entirely reconstituting the Bankruptcy law. By § 12 the Lord Chancellor is empowered to issue a commission giving the Commissioners full powers to dispose of the bankrupt's property—copyhold as well as freehold—for the satisfaction of the creditors' claims. By § 45 the Commissioners may, by writing under their hands, appoint an assignee or assignees of the bankrupt's estate; but these assignees may be replaced by others chosen at a meeting of creditors and approved of by the Commissioners [§ 61]. To these assignees the Commissioners are to convey, by deed indented and enrolled, for the benefit of the creditors all the bankrupt's real estate—"*except Copy or Customary-hold.*" The Commissioners may sell any land whereof the bankrupt is tenant in tail. This is to be done by deed indented and enrolled, and every such deed shall be good against the bankrupt and all whom he might have barred by fine or other means. It is further enacted that all powers vested in any bankrupt which he might legally execute for his own benefit (except the right of nomination to any vacant ecclesiastical benefice) may be executed by

Powers of Commissioners.

the assignees for the benefit of the creditors [§ 77]. In case the value of the estate is more than sufficient to meet the claims of all the creditors, the surplus must be paid by the assignees to the bankrupt, his executors, administrators or assigns [§ 132]. With this we may conclude our brief sketch of the bankruptcy laws within the present period. We have seen the modes in which the Commissioners and assignees in bankruptcy acquired their estates and the nature of these estates, and this is the only part of the subject that has any direct bearing on title.

Surplus of bankrupt's estate—how disposed of.

In the earlier chapters of this work we devoted special sections to the discussion of things incorporeal. It seems, however, no longer necessary to consider the titles to the different incorporeals separately. For a title that was possible for any incorporeal in the preceding period remained possible in this, and any change in the mode of transfer itself—e.g. in the release or the recovery—has been already noted. Repetition will serve no useful purpose, and so it seems better while discussing each title to point out, as we have done, any peculiarity when the subject of the transfer is an incorporeal.

Incorporeals.

It will be remembered that the regular mode of conveying an incorporeal hereditament inter vivos was by means of a deed of grant, and a few notes on that subject may not be out of place. An alien could grant anything that he was capable of taking. The grant of a person attainted of treason or felony was good against all but the king and the lord of whom he held. A feme covert (except the queen) could not grant without the consent of her husband. The grant of an infant (except in the case of special custom) was void ab initio unless the grant were by fine, when it was valid if not set aside during infancy. A grant made under duress was voidable except made by fine. A person non sanae memoriae could not avoid his own grant, but his heirs could do so unless a fine had been employed. A valid grant could not be made by one born deaf *and* dumb *and* blind; but it was otherwise with one deaf and dumb, *or* blind. Further it should be noted that

Deed of grant.

Disabilities.

a grant might be void for uncertainty, as where the limitation of the estate was indefinite. It was also void if made on a corrupt contract or for fraudulent purposes.

Prescription.

As yet there was no prescriptive title to land, such a title being, as before, confined to purely incorporeal hereditaments. The only change in the law of prescription since Littleton was effected by the second section of the statute 32 Hen. VIII. c. 2, which enacted that no person should make any prescription by the seisin of his ancestor or predecessor, except the seisin had taken place within sixty years before the setting up of the claim. But although there was no proper prescription of land, yet, as has been observed before, the operation of Statutes of Limitation might establish a person in secure possession of land to which he had otherwise no title. Thus, after the statute just quoted[1], if *A* on being disseised by *B* took no steps for thirty years to recover his possession he lost the right of possession and had to be content with a mere right of property. And further if he refrained from action for sixty years he was absolutely without remedy.

Copyholds.

Turning now to the subject of copyholds, we have not to describe any great change from the state of affairs at the close of the preceding period. Early in the present period the law as to copyholds received a systematic exposition at the hands of Coke[2], and remained practically unchanged throughout the period. In our last stage we had already reached a position where the tenure of the copyholder was practically as secure as that of a freeholder, and so we find Coke writing,

"But now copyholders stand upon a sure ground, now they weigh not their lord's displeasure, they shake not at every suddaine blast of winde, they eate, drinke, and sleepe securely, onely having a speciall care of the main chance (viz.) to

[1] See also Stat. 21 Jac. I. c. 16. It should be noted that Statutes of Limitation do not affect the rights of the Crown, unless expressly said to do so. "Nullum tempus occurrit regi."

[2] Coke, *The Compleate Copy-holder*.

performe carefully what duties and services soever their tenure doth exact and custome doth require; then let the lord frown, the copyholder cares not, knowing himselfe safe, and not within any danger; for if the lord's anger grow to expulsion the law hath provided severall weapons of remedy; for it is at his election either to sue a sub poena or an action of trespasse against the lord. Time hath dealt very favorably with copyholders in divers respects[1]."

Custom rules.

We have said that custom ruled the copyhold; but a custom to be upheld in the king's courts must be 'reasonable,' 'according to common right,' 'upon a good consideration,' 'compulsory,' and 'certain[2].' As to conveyances of copyholds, it should be noted that if the lord himself were the grantor he was not under any of the disabilities that at common law would invalidate a conveyance—such as infancy, idiocy, lunacy, outlawry, coverture, or the like[3]. It was otherwise, however, in the case of grants between copyholders, for persons incapable of disposing of land at common law could not, without special custom, convey their copyhold. As to the grantee, the copyholder was in the same position as the freeholder, except that in many manors a feme covert could receive a copyhold by surrender from her husband[4] and was thus in a better position than the grantee of a freehold. Moreover the manorial courts were not so particular as the royal courts that the name of the grantee should be accurately set down, for even a description would avail if it were definite.

It may be repeated that a conveyance could not be effected otherwise than in accordance with the custom of the manor. For example, a devise of copyholds could not be made unless there was a custom to that effect. The devise too could be made only by a surrender to the use of the last will and testament, and a declaration of intention in that will. In strictness this was not a will of copyholds, it was merely a declaration of use,

[1] Coke, *The Compleate Copy-holder* (edit. 1644), § ix.
[2] Ibid. § 33. [3] Ibid. § 34. [4] Ibid. § 35.

and so was not affected by the provisions of the Statute of Frauds as to wills—the so-called 'will' need not be signed nor attested. Late in the period, however, the Legislature interfered and made a devise of copyholds valid without any surrender to the use of the will[1]. An exchange could not take place without a surrender to the lord and admittance by him. Again, it was useless to attempt a conveyance by first leasing the copyhold and then passing the reversion by a release; the reversion must first be surrendered to the lord, by whom it would be granted to the lessee[2].

Three stages in normal conveyance.

There were three stages in the normal conveyance of a copyhold—surrender, presentment, and admittance; but in some manors the surrender was dispensed with, in others the presentment, and again in others the admittance. In case of a surrender, the word 'surrender' must be used:

"for if a copyholder come into court and offer to passe his copyhold by word of grant, of gift, of bargain, or sale or such like, I doubt he will faile of his purpose, for as he is tyed to a singular forme of assurance, so is he restrained to peculiar words in his assurance[3]."

The symbolism accompanying the surrender varied with the manor, a rod, a straw, a glove, or some such thing being delivered to the steward, and by him to the grantee in the name of seisin, "et consuetudo loci semper est observanda." The presentment was usually required to be made at the next court day after the surrender, but in some cases it could take place at the second or third court[4]. Admittances were of three sorts—upon a voluntary grant, upon surrender, and upon descent[5]. Even in the case of a voluntary grant the lord[6] was bound strictly by the customs of the manor. He could not, on a regrant, alter the nature and incidents of the tenure.

[1] Stat. 55 Geo. III. c. 192.
[2] Coke, § 36.
[3] Ibid. § 39.
[4] Ibid. § 40.
[5] Ibid. § 41.
[6] If he did not choose to enfranchise the land, as he might do.

"If the custome doth warrant an estate only durante viduitate and the lord admits for life, this shall not binde his heire or successor, because custome hath not sufficiently confirmed it. So if the lord faile in reserving verum et antiquum redditum—as if he reserve ten shillings where the usual rent customably reserved is twenty shillings: this may be a means to avoid the admittance, and the law is very strict in this point of reservation: for though the ancient accustomable rent be reserved according to the quantity, yet if the quality of the rent be altered, the heire may avoid this grant: for if the ancient rent from time to time hath been twenty shillings in gold and the lord reserveth it in silver, this variance of the quality of the rent is in force to destroy the grant: so if the ancient rent hath been accustomably paid at foure feasts in the year and the lord reserveth it at two feasts[1]."

In case of admittances upon surrender the lord was regarded as a mere agent "through whose hands, as through a conduit-pipe, the lands are conveyed to the purchaser[2]." Consequently the lord's title did not affect the validity of the conveyance, it being immaterial whether he held the manor by right or by wrong[3]. This was the case also with the other admittance—viz. that upon descent.

"Admittances, however, upon surrender differ from those upon descent in this; that by surrender nothing is vested in cestui que use before admittance, no more than in voluntary admittance; but upon descent the heir is tenant by copy immediately upon the death of his ancestor: not indeed to all intents and purposes, for he cannot be sworn on the homage nor maintain an action in the lord's court as tenant; but to most intents the law taketh notice of him as of a perfect tenant of the land instantly upon the death of his ancestor, especially where he is concerned with any stranger. He may enter into the land before admittance; may take the profits; may punish any trespass done upon the ground; nay, upon satisfying the lord for his fine due

[1] Coke, § 41. [2] Ibid. § 34. [3] Ibid. § 41.

upon the descent, may surrender into the hands of the lord to whatever use he pleases[1]."

Estates tail in copyholds.

In the preceding period we spoke of estates tail and customary recovery of copyholds, and there is no need to add anything here. Perhaps, however, it should be remarked that there was nothing analogous to general occupancy in the case of a copyhold estate pur autre vie. On the death of the tenant the lord was entitled to the land during the life of cestui que vie.

Bankruptcy.

As to the effect of bankruptcy on the tenure of copyhold, it has been seen that by 6 Geo. IV. c. 16, § 64, the Commissioners could assign all the bankrupt's real estate to assignees in bankruptcy *except that of copyhold or customary tenure.* A later section[2] of the same act provided for the disposition of this property—it could be sold by the Commissioners themselves, by deed indented and enrolled, for the benefit of the creditors. Every person to whom such a sale is made

"shall, before he enter into or take profit of the same, agree and compound with the Lords of the Manors of whom the same shall be holden, for fines, dues and other services as theretofore have been usually paid for the same, and thereupon the said Lords shall at the next or any subsequent court to be holden for the said manors grant unto such vendee, upon request, the said copy or customary lands... reserving the ancient rents, customs and services and shall admit him tenant of the same[3]."

[1] Blackstone, *Comm.* II. c. 22, p. 371. Cf. Coke, § 41.
[2] 6 Geo. IV. c. 16, § 68. [3] Ibid. § 69.

Equity.

In the preceding period we referred to the rise of the Chancellor's jurisdiction and the growing importance of equitable estates. In fact by the time of Henry VII. most of the estates in the kingdom were held by way of use. Towards the close of the period, however, several efforts were made by the Legislature to keep uses within narrower limits and to assimilate them to legal estates[1]; but these attempts were all rendered insignificant by the sweeping character of the Statute of Uses. At first sight this statute seemed to abolish uses altogether and so put an end to equitable estates; but this was not to be. In the first place, it should be remembered that the Statute of Uses does not operate where an *active* duty is imposed on the feoffee to uses. In such a case we do not find "one person seised to the use of *another person*," and so the case of an active trust was ruled out of the operation of the statute shortly after the passing of that act. Thus in 1545 we find:

Statute of Uses did not affect an *active* trust.

"Home fait feoffment in fee al son use per term de vie et que puis son decease J. N. prendra les profits, ceo fait un use in J. N. Contrar s'il dit que puis son mort ses feoffees prendront les profits et *liveront eux* al J. N. ceo ne fait use in J. N. car il nad eux nisi par les mains les feoffees[2]."

Moreover the statute had no effect on copyholds, as it speaks of persons *seised* to the use of others, and seisin implies a freehold.

Thus the Chancellor was still left with a field for his jurisdiction, but the field was a very small one compared with its former extent. Mr Ames has shown us that uses were suppressed for a hundred years after the statute[3], and has explained the meaning of the doctrine laid down

Effect of Statute of Uses on Chancellor's jurisdiction.

[1] Statutes 1 Rich. III. c. 1; 1 Hen. VII. c. 1; 19 Hen. VII. c. 15.

[2] Brooke's Abridgment, *Feoffment al Uses*, 52, quoted by Digby, p. 368.

[3] Ames, *Green Bag*, IV. 81.

in 1557 in *Tyrell's* case[1] that "a use cannot be engendered upon a use," or as it was afterwards commonly expressed 'there cannot be a use upon a use.' Until 1634 the statute operated on the first use and the second was simply void for repugnance. However in a case *Samback v. Dalton*, about 1634, the Chancery enforced the second use and in this way equitable estates were completely re-established under the modern name of Trusts.

Trusts.

The doctrines as to trusts follow in the main those that had prevailed concerning uses, "indeed," said Lord Hardwick, "I wonder how they ever came to be distinguished." In some minor points, however, the old rules as to uses were departed from. Thus it was held that a corporation might act as trustee of real estate upon charitable trusts[2]. Moreover a husband was allowed his estate by the curtesy in the trust estate of his wife; but the analogy of the common law was not followed in the case of dower.

[1] The importance of case law in England could scarcely be better illustrated than by reference to two cases, Tallarum's case and Tyrell's case, each of which affected the land law far more profoundly than many Acts of Parliament. The following is from Dyer's *Reports*, 155 a:

Tyrell's case.

TYRELL'S CASE. (MICHAELMAS TERM, 4 AND 5 PHILIP AND MARY.)

Jane Tyrell, widow, for the sum of £400 paid by G. Tyrell her son and heir apparent, by indenture enrolled in Chancery in the 4th year of E. 6, bargained, sold, granted, covenanted and concluded to the said G. Tyrell all her manors, lands, tenements, etc. to have and to hold the said manors, etc. to the said G. T. and his heirs for ever, to the use of the said Jane during her life without impeachment of waste, and immediately after her decease to the use of the said G. T. and the heirs of his body lawfully begotten; and in default of such issue, to the use of the heirs of the said Jane for ever. Quaere well whether the limitation of those uses upon the habendum are not void and impertinent, because an use cannot be springing, drawn, or reserved out of an use, as appears primâ facie? And here it ought to be first an use transferred to the vendee before that any freehold or inheritance in the land can be vested in him by the enrolment etc. And this case has been doubted in the Common Pleas before now: ideo quaere legem. But all the judges of C. B. and Saunders, C. J. thought that the limitation of uses above is void...because an use cannot be engendered of an use."

[2] See *Green v. Rutherford*, 1. Vesey, 468—the question being whether St John's College, Cambridge, could be seised to a trust.

When dealing with equitable estates in the preceding period, we saw that no formalities were required for their creation. An important change in this matter was effected by the Statute of Frauds, whose sections relating to the present subject have been already quoted[1]. It should be noted that the seventh section speaks of *declarations* and *creations* of trusts of lands, tenements and hereditaments (*including copyholds*); that it requires the declaration or creation of trust to be *manifested* and proved by writing; that the statute is satisfied in this matter by writing *subsequent* to the creation of the trust; that a deed is *not* necessary; that trusts may also be created by will[2]; and finally that the special proviso of § 8 protects trusts that arise by implication or construction of law from the necessity of writing. It will be seen, then, how few were the formalities required for the creation of a trust even after the Statute of Frauds. Where writing was required no special form was insisted on, a letter or memorandum signed by the person creating the trust[3] was sufficient. Any words that expressed an intention to constitute a trust were effective, however untechnical they might be; and, especially when dealing with wills, the Chancery seemed eager to catch at any phrase that could be twisted into an expression of a trust. Thus in 1702 in *Eales v. England* the Chancellor held that the words "my will is that he (the legatee) give... to *A* at his death" imposed a trust on the legatee. This is the first important example of a *precatory trust*, a class that grew considerably throughout the eighteenth century, almost the only restriction imposed being the rule that "to create a precatory trust

Creation of trusts. —Express trusts.

Precatory trusts.

[1] *Ante*, p. 149.

[2] § 7 of Statute of Frauds. If *A* devised realty to *B*, but upon the understanding between *A* and *B* that the property was to be held in trust for *C*, then *parol evidence* of this understanding would be admitted, and if the court were satisfied that a trust was intended it would establish the trust.

[3] The party enabled to declare such a trust was the owner of the *beneficial* interest, the holder of the legal estate in case of a trust being a mere 'conduit-pipe.'

the object and the subject of it must be certain," and this was not settled till the end of the century. Towards the close of the period, however, the Court of Chancery showed an inclination to oppose any further extension of the rules giving effect to precatory trusts.

Before leaving the subject of the creation of trusts by express declaration it should be noted that although the court will interfere to execute a trust if by any possibility it can, yet it will not do so unless there is a plain intention to create a definite trust. And although it is true that "if the act is completed, though *voluntary*, the court will act upon it[1]," on the other hand a defective conveyance without valuable consideration will not be construed as a declaration of trust. "There is no instance where a court of equity has compelled a man to complete a mere act of volition[2]."

Trusts arising by operation of law.

So much of the creation of trusts by express declaration. We must turn now to the important class of trusts that arise "by implication or construction of law"—i.e. we have to deal with Resulting and Constructive Trusts. Two cases of resulting trusts are usually considered—(*a*) where an owner makes a conveyance and there is no ground of inference that he means to dispose of the beneficial interest, then there is said to be a resulting trust in favour of this owner; and (*b*) where a purchaser takes a conveyance of a legal estate in the name of a third person and there is nothing to indicate that he intended the conveyance for the benefit of that third person, then a trust results to him. These principles were arrived at early in the present period. It should be noted, however, that the *presumption* of a resulting trust might be rebutted by parol evidence of a contrary intention, and further that if the grantee were the wife or child of the actual purchaser or grantor the presumption was in favour of *advancement*, i.e. of a real benefit for the wife or child. This was first laid down by Lord Nottingham in 1677.

[1] Lord Eldon.

[2] Lord Northington, in *Wycherley v. Wycherley*, 2 Eden, 177.

In the previous year the same judge said,

"There is one good general and infallible rule that applies to both these kinds of trusts, to which there is no exception, and that is this—the law never implies, the court never presumes, a trust but *in case of absolute necessity.* The reason of this rule is sacred, for if the Chancery do once take liberty to construe a trust by implication of law, or to presume a trust unnecessarily, a way is opened to the Lord Chancellor to construe or presume any man in England out of his estate."

Constructive trusts.

The doctrine of *constructive* trusts has been thus defined. "Wherever a person clothed with a fiduciary character gains some personal advantage by availing himself of that character, he becomes a trustee of the advantage so gained." It need scarcely be remarked that the doctrine is a very wide one and operates in a great variety of cases; but in spite of its importance it need not delay us longer here.

As a rule "equity follows the law."

A trust estate, when once created in any of the above ways, conformed as a rule to the law as to legal estates. The main difference was that trusts were independent of the common law founded on the principles of tenure, for a trust was not holden of any one. Thus it was decided that a trust was not liable to forfeiture or escheat. With forfeiture there was some doubt as to the construction of various statutes of Treason in Henry VIII.'s reign[1], and in the matter of escheat Lord Mansfield thought that a trust estate should escheat to the king, but the majority of the court decided against him[2]. In nearly all other matters equity followed the law. There could be an equitable estate in fee-simple, fee-tail, for term of life, etc., and in the devolution of these the analogy of the common law rules of descent was followed. With reference to estates tail, however, it should be remarked that at first they found little favour in equity, and before the Restoration

[1] 26 Hen. VIII. c. 13, § 5; 27 Hen. VIII. c. 10; 33 Hen. VIII. c. 20, § 2.

[2] *Burgess v. Wheate*, 1 Eden, 223.

they could be barred by a mere conveyance without fine. In later days it was thought advisable to follow the example of the common law even in this matter, and the fiction of an equitable recovery with an equitable tenant to the praecipe was employed to bar estates tail[1]. As might be expected springing, shifting and future trusts were allowed with no other limit than the rule against perpetuities. The rule in Shelley's case was also adopted[2]. In the matter of curtesy, equity followed the law even though the fee simple had been settled for the separate use of the wife[3]. This was held at the beginning of the 18th century. With dower, however, equity refused to follow the law, and the anomaly was not removed, in spite of the attempt of Jekyll, M. R., till the Dower Act of 1833. In one case the Legislature interfered to make equity follow the law where the Court of Chancery had hesitated. By § 10 of the Statute of Frauds trust estates in fee-simple were made assets for the payment of debts[4].

Alienation of trusts inter vivos.

It was in the matter of alienation inter vivos that equity differed most materially from the common law. As we have already seen, before the Statute of Frauds no formalities whatever were necessary for the transfer of a trust. The ninth section of that act[5] requires every grant or assignment of any trust to be in writing signed by the party granting or assigning the same[6]. Even after this, however, any instrument however destitute of form would suffice; a deed was certainly not necessary. On the other hand the Court of Chancery would not enforce an imperfect gift in favour of a volunteer, and in case of a voluntary conveyance it had often to consider whether or not the transfer of the trust was intended as a final act or not. If it was so intended and was in writing signed

[1] *North v. Way*, 1 Vern. 13.

[2] *Jones v. Morgan*, 1 Bro. cc. 206, 222.

[3] An equitable estate was not subject to curtesy if the husband were an alien.

[4] *Ante*, p. 150.

[5] Ibid.

[6] The transfer could be made by will; § 9 says so explicitly.

by the beneficial owner, then the donee's title was complete; but the mere writing was not of itself conclusive of the intention of the donor. Parol evidence might be given as to the circumstances in which it was written to show whether or not it was intended as irrevocable[1]; but instructions and declarations made *after* the writing and unconnected with declarations or acts at the time, could not be given in evidence.

Estate of trustee.

As to the estate of the trustee, little need be said, as he was merely the nominal instrument to execute the trust. Nothing that the trustee could do could disappoint the interests of cestui que trust, unless for a valuable consideration he disposed of the estate to a purchaser who had no notice of the trust. A trustee need not accept the position; but he could do so either by signing the trust deed or by expressly declaring his assent, or by acting as trustee, and even if he did not so act he was *presumed* to have accepted the position if he had not disclaimed within a reasonable time after receiving notice of his appointment. The extent of his estate depended entirely on the instrument creating the trust, it might be for a term, for life, or inheritable. It was decided that the word 'heirs' was not necessary to give the trustee an estate of inheritance if a less estate would be insufficient to enable the trustee to execute the trust[2]. On the death of a trustee intestate his trust estate descended to his heir at law, or to his customary heir; but the trustee could devise his estate, and it was held that a general devise carried the trust estate in the absence of any indication of a contrary intention. In such circumstances however the Court of Chancery might appoint a new trustee if the heir or devisee was considered unsuitable for the position of trustee. The trustee could not resign his office except he was empowered to do so by the trust instrument. He could get out of his responsibilities by death, by duly accomplishing and winding up the trust,

[1] *Stratford v. Powell*, 1 Ball and Ball, 14, 21.
[2] *Shaw v. Weigh*, 1 Equity Cases Abr. 185.

or by conveying away the trust property at the request of cestui que trust—the latter being of full age and under no disability. In case the trustee became bankrupt the Chancellor might order the conveyance or assignment of the property to other trustees[1]. The king was authorised to make grants by sign manual to trustees with the object of executing the trust affecting estates that had been forfeited to the Crown[2], and by a statute made very near the close of this period it was enacted that no land vested in any person on trust should escheat to the king or other person by reason of the attainder or conviction of any such trustee[3].

Trusts for wife's separate use.

The objects for which trusts were created were, of course, of the most varied character, but one of them is of such importance that it merits special notice. It has been seen that at common law a married woman could hold no property; it was reserved for the Courts of Equity to bring the law more in touch with the requirements of modern life. As early as Elizabeth's reign we find cases in which a separate maintenance was secured to a wife, but this only on a voluntary agreement between husband and wife to live apart[4]. At a later stage a pre-nuptial contract was sometimes made which secured lands to trustees with the duty of paying the rents and profits to the wife. All such plans required the concurrence of the husband, and it was not till the beginning of the 18th century that much progress was made towards modern methods. A most important step was taken in 1725 when it was decided[5] that if property were given to a married woman—without the intervention of any trustee —with the direction that it should be for her separate use, then the husband, if he took the legal estate, was bound to hold it in trust for his wife. It was just at the close of the century that the plan of imposing a restraint

[1] 6 Geo. IV. c. 16, § 79. [2] 39 and 40 Geo. III. c. 88, § 12.
[3] 11 Geo. IV. and 1 Will. IV. c. 60, § 3.
[4] See *Sanky v. Goulding*, Cary's Rep. 124.
[5] See *Bennet v. Davis*, 2 Peere Williams, 316.

on anticipation was adopted; but the subject was so beset with difficulties that many questions connected with it were not settled within the present period. With these and with later developments it will be more convenient to deal when taking our final survey of equity in the last chapter.

Trusts of copyholds.

So far we have been dealing mainly with freeholds. Turning to copyholds, it will be remembered that they are not within the operation of the Statute of Uses, so that when land was surrendered to the lord to *the use of A* the fact that *A*'s title was independent of that of the lord was due not to the Statute of Uses but to the power of custom. Such an estate was not equitable, but legal. If however the land were surrendered to the lord to *the use of A in trust for B*, then the Court of Chancery would compel *A* to perform the trust, and *B*'s estate would be purely equitable.

Creation of.

As with freeholds, no special formalities were needed to create a trust of a copyhold, the one restriction being that after the Statute of Frauds the declaration of trust must be in writing. The doctrines of resulting and constructive trusts were extended to copyholds, and in most matters affecting the devolution of the trust estate equity followed the law. There was a difficulty, however, with resulting trusts when estates pur autre vie were involved. Thus if *A* paid the fine on the grant of a copyhold to *B for his life*, there being no consideration or relationship, *B* held the land in trust for *A*. If now *A* died intestate before *B*, on whom was the benefit of the trust to devolve? There was no such thing as general occupancy with copyholds, and estates pur autre vie were not within the Statute of Frauds[1]—so that it was not clear who was entitled during the remainder of *B*'s life. In such circumstances the balance of authority inclined towards giving the residue of the trust to *A*'s *personal* representative[2].

[1] Nor within 14 Geo. II. c. 20, § 9.

[2] See *Clark v. Danvers*, 1 Ch. Ca. 310; *Howe v. Howe*, 1 Vern. 415; *Rundle v. Rundle*, 2 Vern. 252, 264; *Withers v. Withers*, Amb. 151.

Conveyance of equitable estates.

It should be noticed that the owner of the equitable estate was not a copyholder, that position being held by the trustee. It followed that the trust estate could not be transferred by the method peculiar to copyholds—surrender and admittance. The conveyance was effected by a surrender to the trustee, and his admittance as legal tenant to the lord, while the trust itself was required by the Statute of Frauds to be evidenced by a written instrument signed by the party conveying the trust. This trust might or might not be entered on the court rolls. The lord could not be compelled to allow the entry on the rolls; but if the surrender were made upon trust either expressed or referred to on the rolls, then the lord was bound to execute the trust in case the tenant forfeited his estate.

Creation and transfer by will.

A trust of copyhold could also be created and transferred by means of a will. In dealing with the purely legal aspect of copyholds, we saw that, in strictness, there was formerly no such thing as a will of copyholds[1]. The copyhold had to be surrendered to *the use* of the will, which operated only as a declaration of use. Thus copyholds at *law* were out of the Statute of Frauds in so far as that was concerned with wills, so that, in spite of that statute, when a copyhold was devised by means of a surrender to the use of a will, the will need not have been signed or attested. When a will was employed to create or transfer an equitable estate, two cases had to be distinguished, (*A*) where custom permitted the devise of the *legal* estate, (*B*) where it did not. As a general rule equity followed the law, so that it might have been expected that the equitable estate could be devised in (*A*), but not in (*B*). Indeed we find that in (*A*) the estate could be disposed of by will, and further that as the will of the legal estate was not within the Statute of Frauds, neither was the will of the equitable estate—it required neither signature nor witnesses[2]. Equity, however, was not

[1] See p. 175.

[2] See Lord Hardwick in *Hussey v. Grills*, Amb. 300.

thoroughly consistent in following the law, for it allowed a will of the equitable estate even in (*B*), and as in this case it was not bound by the analogy of the law, the will was required to satisfy the conditions of the Statute of Frauds[1]. In case a copyhold were devised for sale to executors as trustees then the executors being trustees must first have acquired the legal estate before selling; i.e. they must have been admitted as tenants of the lord. If, however, the will merely *empowered* the executors to sell, the executors, although they had this power, were not trustees, and the purchaser could be admitted as taking directly under the will.

Finally it may be noted that equitable estates of copyhold were not subject to freebench, and (in this period) were not assets by descent.

Equitable estates not subject to freebench and not assets by descent.

[1] *Lewis v. Lane*, 2 M. and K. 449; *Hussey v. Grills*, Amb. 300.

CHAPTER VIII.

FIFTH PERIOD. WILLIAM IV. AND VICTORIA.

(PRESCRIPTION ACT TO LAND TRANSFER ACT.)

1832—1897.

Legislation.

In the earlier chapters we have followed the changes of title to the verge of the great period of reform ushered in by the Reform Bill. We enter now on the last stage of our journey. Its chief characteristic is an extraordinary richness in legislative enactments. In this period the number of statutes dealing with title is at least three times as large as that for the whole preceding English history, and many of these statutes are epoch-making in their nature. Following out the previous plan of campaign, we shall begin with a survey of the most important acts in the period and leave those of less magnitude to be referred to as we deal seriatim with the various modes of acquiring real property.

Prescription Act, 1832.

The first great act that must be considered is the Prescription Act[1] of 1832. It inaugurated a new species of prescription by declaring that a perfect title to easements and profits is conferred on those that have enjoyed them continuously and as of right for certain definite periods. It should be noticed, however, that the act does not deal with land, but only with rights over land, and further that it does not profess to supersede the common

[1] Stat. 2 and 3 Will. IV. c. 71.

law doctrines as to prescription, but merely to add something thereto.

§ 1. "No claim which may be lawfully made at the common law by custom, prescription or grant to any right of common or other benefit to be taken and enjoyed from or upon any land of our sovereign lord the king, or any land being parcel of the duchy of Lancaster or of the duchy of Cornwall or of any ecclesiastical or lay person, or body corporate, except such matters and things as are herein specially provided for, and except tithes, rent and services, shall, where such right profit or benefit shall have been actually taken and enjoyed by any person claiming right thereto without interruption for the full period of thirty years, be defeated or destroyed by showing only that such right, profit or benefit was first taken or enjoyed at any time prior to such period of thirty years, but nevertheless such claim may be defeated in any other way by which the same is now liable to be defeated; and when such right profit or benefit shall have been so taken and enjoyed as aforesaid for the full period of sixty years the right thereto shall be deemed absolute and indefeasible unless it shall appear that the same was taken and enjoyed by some consent or agreement expressly made or given for that purpose by deed or writing."

Claims to right of common and other profits à prendre, not to be defeated after 30 years' enjoyment *by showing the commencement.*

After 60 years' enjoyment the right to be absolute, unless had by consent or agreement.

§ 2. The next section makes a similar statement with reference to claims of rights of way, and other easements, the periods, however, in these cases being twenty and forty years.

Rights of way and other easements —periods 20 and 40 years.

§ 3. "When the access and use of light to and for any dwelling house, workshop, or other building shall have been actually enjoyed therewith for the full period of twenty years without interruption, the right thereto shall be deemed absolute and indefeasible, any local usage or custom to the contrary notwithstanding, unless it shall appear that the same was enjoyed by some consent or agreement expressly made or given for that purpose by deed or writing."

Light, 20 years.

§ 7. "Provided that the time during which any person otherwise capable of resisting any claim to any of the matters before mentioned shall have been or shall be an infant, idiot,

Proviso for infants, etc.

non compos mentis, feme covert, or tenant for life, or during which any action or suit shall have been pending, and which shall have been diligently prosecuted until abated by the death of any party or parties thereto, shall be excluded in the computation of the periods hereinbefore mentioned, except only in cases where the right or claim is hereby declared to be absolute and indefeasible."

What time to be excluded in computing the term of 40 years.

§ 8. "Provided always, that when any land or water upon, over or from which any such way or other convenient watercourse or use of water shall have been or shall be enjoyed or derived hath been or shall be held under or by virtue of any term of life, or any term of years exceeding three years from the granting thereof, the time of the enjoyment of any such way or other matter as herein last before mentioned, during the continuance of such term, shall be excluded in the computation of the said period of forty years, in case the claim shall within three years next after the end or sooner determination of such term be resisted by any person entitled to any reversion expectant on the determination thereof."

Real Property Limitation Act, 1833.

In the following year (1833) a very important act was passed for the limitation of actions—"The Real Property Limitation Act, 1833." A limitation act does not, as has often been remarked, set up a new species of title; but it has the effect of *extinguishing* the right of one who does not assert his rights within a certain period from the time at which they first accrued[1] to the person through whom he claims. The present act fixed the period as twenty[2] years in the case of land and rents. For an advowson the period is three successive incumbencies, all adverse to the right of presentation or gift that is claimed

No land or rent to be recovered within 20 years after right of action accrued.

Advowson.

"if the times of such incumbencies taken together shall amount to the full period of sixty years; and if the times of such incumbencies shall not together amount to the full period of sixty years, then after the expiration of such further

[1] Real Property Limitation Act, 1833, Stat. 3 and 4 Will. IV. c. 27, § 34.

[2] Subsequently altered to *twelve* by Stat. 37 and 38 Vict. c. 57, § 1.

time as with the times of such incumbencies will make up the full period of sixty years[1]."

And whatever the length of the incumbencies no advowson is to be recovered after one hundred years from the time at which adverse possession of the benefice was obtained[2].

Sections 3—9 lay down rules for fixing the time at which the right in question shall be deemed to have accrued. It is further stated that a mere entry is not to be deemed possession[3], that no right can be preserved by continual or other claim[4], that possession by one coparcener is not to be deemed possession by the others[5], and that possession by a younger brother or other relation is not to be regarded as possession by the heir[6]. There is an important proviso to the effect that when a written acknowledgment of the title of the person entitled to any land or rent has been given to him or his agent and signed by the person in possession, the period of twenty years is to begin from the date of that acknowledgment[7]. Further it is enacted that if, when the right first accrued, the person entitled was under the disability of infancy, coverture, lunacy, or absence beyond seas, then recovery might be made within ten[8] years next after the person ceased to be under such disability or died[9]. However, even in this case recovery could not be made after forty[10] years from the time when the right first accrued, and no further time was allowed for a succession of disabilities[11].

Rules as to possession.

Acknowledgment in writing equivalent to possession or receipt of rent.

Person under disability to be allowed ten years.

But no action shall be brought beyond 40 years after the right accrued.

Sections 21—23 deal with estates tail. By section 21, when the right of a tenant in tail to bring an action for the recovery of land or rent is extinguished by lapse of

[1] R. P. L. A. (1833), § 30. [2] Ibid. § 33. [3] Ibid. § 10.
[4] Ibid. § 11. [5] Ibid. § 12. [6] Ibid. § 13.
[7] Ibid. § 14.
[8] Afterwards changed to *six* by Stat. 37 and 38 Vict. c. 57, § 9.
[9] § 16.
[10] Changed to *thirty* by Stat. 37 and 38 Vict. c. 57, § 5.
[11] R. P. L. A. (1833), § 18.

time, the rights of all persons entitled to estates that the tenant in tail might have barred are also extinguished. And, by section 22, if the tenant in tail die before the expiration of the period of limitation, no one claiming any estate that the tenant in tail might have barred can bring an action for recovery unless within the period during which the tenant in tail might have done so, had he not died. By section 23, when a tenant in tail makes an assurance creating a base fee, possession under this assurance for twenty years [altered to twelve years by the Act of 1874] from the time at which the tenant in tail might have completely barred the entail without the consent of any other person operates to turn the base fee into a fee simple.

Limitation as to suits in Equity.

The twenty-fourth section of the act made the above rules equally applicable to an equitable estate[1], provided that, in cases of express trust, the right shall not be deemed to have accrued until a conveyance to a purchaser, and shall then be deemed to have accrued only as against such purchaser and any person claiming through him[2].

In cases of express trust the right not to accrue until conveyance.

As to cases of Fraud.

In cases of concealed fraud no time shall run while the fraud remains concealed; but "reasonable diligence" in discovering the fraud is required from the person claiming the benefit of this provision, and

[1] But prior to the year 1890 the application of the statute was confined to equitable interests arising by operation of law. It did not apply to the claim of a cestui que trust against his trustee except in the case of money charged on land. However, the Trustee Act of 1888 declared in § 8 (which came into force on Jan. 1, 1890) that "In any action or other proceedings against a trustee or any person claiming through him, except where the claim is founded upon any fraud or fraudulent breach of trust to which the trustee was party or privy or is to recover trust property, or the proceeds thereof still retained by the trustee, or previously received by the trustee and converted to his use, the following provision shall apply:—All rights and privileges conferred by any statute of limitations shall be enjoyed in the like manner and to the like extent as they would have been enjoyed in such action or other proceeding if the trustee or person claiming through him had not been a trustee or person claiming through him."

[2] R. P. L. A. (1833), § 25.

"nothing in this clause shall enable any owner of lands or rents to have a suit in equity for the recovery of such lands or rents, or for setting aside any conveyance of such lands or rents, on account of fraud, against any bonâ fide purchaser for valuable consideration who has not assisted in the commission of such fraud, and who at the time that he made the purchase did not know and had no reason to believe that any such fraud had been committed[1]."

Fines and Recoveries Act, 1833.

In the same year was passed the famous "Act for the Abolition of Fines and Recoveries and for the substitution of more simple modes of assurance[2]." The act is a lengthy one of ninety-three sections, and its importance necessitates a somewhat minute examination of its contents.

Fines and Recoveries abolished.

§ 2 abolishes fines and recoveries after the 31st Dec. 1833.

Lands in ancient demesne.

§§ 4, 5 and 6 deal with the conveyance of lands in ancient demesne, a matter which had previously given rise to great confusion. The conveyance was made by fine or recovery suffered in the lord's court; but owing to the fact that the tenure of ancient demesne was not always known as such, the judicial proceedings were often taken in a superior court—a mistake that engendered great trouble. The present Act attempted to correct this by declaring that fines and recoveries of lands in ancient demesne, levied or suffered in the manorial court after other fines and recoveries in a superior court, should be as valid as if the tenure had not been changed by the proceedings in the superior court; further that fines and recoveries should not be invalid in other cases though levied or suffered in courts whose jurisdictions did not extend to the lands dealt with by the court; and moreover that the tenure of ancient demesne, which had been destroyed by a fine or recovery in a superior court, should be restored where the rights of the lord of the manor had been recognised within twenty years.

[1] Ibid. § 26.

[2] Stat. 3 and 4 Will. IV. c. 74.

The next section of permanent importance in connection with title is the fourteenth which removes the force of warranties.

Estates tail no longer barrable by Warranty.

"All warranties of lands which, after the 31st Dec. 1833, shall be made or entered into by any tenant in tail thereof shall be absolutely void against the issue in tail, and all persons whose estates are to take effect after the determination or in defeasance of the estate tail."

§ 15 enacts that

Power to dispose of lands entailed in fee simple, or for a less estate, saving the rights of certain persons.

"every actual tenant in tail, whether in possession, remainder, contingency, or otherwise, shall have full power to dispose of, for an estate in fee simple absolute or for any less estate, the lands entailed as against all persons claiming the lands entailed by force of any estate tail which shall be vested in or might be claimed by or which, but for some previous Act, would have been vested in or might have been claimed by the person making the disposition, at the time of his making the same, and also as against all persons including the King's most excellent Majesty whose estates are to take effect after the determination or in defeasance of any such estate tail; saving always the rights of all persons in respect of estates prior to the estate tail in respect of which such disposition shall be made, and the rights of all other persons except those against whom such disposition is by this Act authorised to be made."

Exception in case of women.

However, in §§ 16 and 18, it is provided that this wide power of disposition is not to be exercised by women tenants in tail ex provisione viri under Stat. 11 Hen. VII. c. 20, except with assent as specified in that act; nor by those restrained from barring their estates tail by Stat. 34 and 35 Hen. VIII. c. 20; nor by tenants in tail after possibility of issue extinct.

Protector.

§§ 22—33 deal with the appointment of a protector in various contingencies, and in § 34 it is laid down

His consent required to enable

"that if at any time when any person, actual tenant in tail of lands under a settlement but not entitled to the remainder or reversion in fee immediately expectant on the determina-

tion of his estate tail, shall be desirous of making under this Act a disposition of the lands entailed, there shall be a protector of such settlement, then and in every such case the consent of such protector shall be requisite to enable such actual tenant in tail to dispose of the lands entailed to the full extent to which he is hereinbefore authorized to dispose of the same; but such actual tenant in tail may without such consent make a disposition under this Act of the lands entailed, which shall be good against all persons who by force of any estate tail which shall be vested in or might be claimed by or which but for some previous act or default would have been vested in or might have been claimed by the person making the disposition at the time of his making the same, shall claim the lands entailed."

Tenant in tail to create a larger estate than a base fee.

§ 35 requires the consent of the protector of the settlement by which the estate tail was created to the alienation of the base fee. Moreover, by § 36, the protector is to be subject to no control in the exercise of his power of consenting.

Base fee.

Protector to be free from control.

§ 40. "Every disposition of lands under this Act by a tenant in tail thereof shall be effected by some one of the assurances (*not being a will*) by which such tenant in tail could have made the disposition of his estate were it an estate at law in fee simple absolute: provided nevertheless that no disposition by a tenant in tail shall be of any force either at law or in equity, under this Act, unless made or evidenced by deed; and that no disposition by a tenant in tail resting only in contract, either expressed or implied or otherwise and whether supported by a valuable or meritorious consideration or not, shall be of any such force at law or in equity under this Act, notwithstanding such disposition shall be made or evidenced by deed; and if the tenant in tail making the disposition shall be a married woman, the concurrence of her husband shall be necessary to give effect to the same; and any deed which may be executed by her for effecting the disposition shall be acknowledged by her as hereinafter directed."

Tenant in tail to make a disposition by deed as if seised in fee, but not by will or contract; and, if a married woman, with husband's concurrence.

By § 41, every such assurance is inoperative unless enrolled in Chancery within six months.

Enrolment necessary.

Consent of protector has to be given.

§ 42. "The consent of the protector of a settlement to the disposition under this Act of a tenant in tail shall be given either by the same assurance by which the disposition shall be effected, or by a deed distinct from the assurance, and to be executed either on or at any time before the day on which the assurance shall be made, otherwise the consent shall be void."

If the consent is evidenced by a separate deed it is to be considered as unqualified, unless it is expressly limited; and, once duly given, it cannot be revoked [§§ 43, 44]. To be effective however this separate deed must be enrolled with or before the assurance [§ 46].

Courts of Equity not to give effect to dispositions invalid in Courts of Law.

By § 47, Courts of Equity are excluded from giving any effect to dispositions by tenants in tail or consents of protectors, which are invalid in Courts of Law.

Case of lunacy etc.

In cases of lunacy, idiotcy, and unsound mind, the consent of the lord high chancellor, lord keeper, or lords commissioners for the custody of the great seal, or other person or persons intrusted with the care of the lunatic etc., is required, and in this case no document or instrument as evidence of the consent of the protector is needed beyond the order in obedience to which the disposition has been made [§§ 48, 49].

Copyholds included, with certain variations.

§ 50. "All the previous clauses in this Act, so far as circumstances and the different tenures will admit, shall apply to lands held by copy of court roll, except that a disposition of any such lands under this Act by a tenant in tail thereof, whose estate shall be an estate at law, shall be made by surrender and except that a disposition of any such lands under this Act by a tenant in tail thereof, whose estate shall be merely an estate in equity, may be made either by surrender or by deed as hereinafter provided, and except so far as such clauses are otherwise altered or varied by the clauses hereinafter contained."

The consent of the protector must be by deed and is to be produced to the lord of the manor of which the lands are parcel, or to his steward or deputy steward, otherwise it is ineffectual. The deed must be indorsed

by the lord, steward, or deputy steward and then entered on the court rolls of the manor

"and the indorsement purporting to be so signed shall of itself be *prima facie* evidence that the deed was produced within the time limited and that the person who signed the indorsement was the lord of the manor, or his steward, or the deputy of such steward" [§ 51].

Equitable estate in copyhold.

§ 53 gives a tenant in tail of lands held by copy of court roll, whose estate is merely equitable, full power to dispose by deed of such lands under this act in the same manner in every respect as he could have done if they had been of freehold tenure:

"And all the previous clauses in this Act shall, so far as circumstances will admit, apply to the lands in respect of which any such equitable tenant in tail shall avail himself of this present clause."

Inrolment not necessary as to Copyholds.

§ 54. "Provided always, and be it further enacted, That in no case where any disposition under this Act of lands held by copy of court roll, by a tenant in tail thereof, shall be effected by surrender or by deed, shall the surrender or the memorandum or a copy thereof or the deed of disposition or the deed, if any, by which the protector shall consent to the disposition, require inrolment otherwise than by entry on the Court rolls."

Power of commissioner in bankruptcy to dispose of the estate tail.

In case of the bankruptcy of tenant in tail, the commissioner shall by deed dispose of the entailed lands to a purchaser for the benefit of the creditors, and, as regards the consent of the protector and enrolment of the deed, the commissioner is in the same position as the tenant in tail before his bankruptcy [§§ 56—59]. By § 62, a voidable estate created in favour of a purchaser by an actual tenant in tail or tenant in tail entitled to a base fee, who afterwards becomes bankrupt, shall be confirmed by the disposition of the commissioner, except against a purchaser for value and without notice. All acts of a bankrupt tenant in tail are void against any disposition under this act by the commissioner—but, subject to the

powers given to the commissioner, a bankrupt retains his powers of disposition. And if the tenant dies before any judgment against him has affected his lands, or before he has been adjudged bankrupt, then the entailed lands are no longer subject to his debts, except in case of certain Crown debts. It should be noted, however, that the commissioner can dispose of the lands *after* the death of the tenant in tail

"in case at the time of the bankrupt's decease there shall be no protector of the settlement by which the estate tail of the actual tenant in tail, or the estate tail converted into a base fee, as the case may be, was created; or in case the bankrupt had been an actual tenant in tail of such lands, and there shall at the time of the disposition be any issue inheritable to the estate tail of the bankrupt in such lands, and either no protector of the settlement by which the estate tail was created or a protector of such settlement who in the manner required by this Act, shall consent to the disposition, or a protector of such settlement who shall not consent to the disposition; or in case the bankrupt had been a tenant in tail entitled to a base fee in such lands, and there shall at the time of the disposition be any issue who if the base fee had not been created would have been actual tenant in tail of such lands, and either no protector of the settlement by which the estate tail converted into a base fee was created, or a protector of such settlement who in the manner required by this Act shall consent to the disposition" [§ 65].

Extension to money to be invested in purchase of lands that are to be entailed.

§ 71 extends the previous clauses to the case of lands of any tenure that are appointed to be sold, where the purchase money is subject to be invested in the purchase of lands to be entailed, and where money is subject to be invested in like manner—except where the land to be purchased is leasehold, when it is to be regarded as personalty.

A married woman to have same powers of disposition as a feme sole.

§§ 70—90 deal with the dispositions of married women. Such a woman is empowered to dispose, by deed, of lands of any tenure just as if she were a feme sole. But every such deed—not executed by her in the character of pro-

tector—must be produced and acknowledged by her before a judge of one of the superior courts or commissioners appointed for the purpose. Such judge or commissioners must examine her, apart from her husband, touching her knowledge of the deed and ascertain whether she freely and voluntarily consents to such deed—and if it be found that she does not freely and voluntarily consent, the deed is void.

Not to extend to copyholds in certain cases.

A proviso in § 77 saves from the necessity of a deed the transfer of a married woman's estate in copyhold in cases where the conveyance could previously have been made by her, in concurrence with her husband, by surrender into the hands of the lord of the manor of which the lands to be conveyed formed a parcel. If the woman's estate in the copyhold is merely equitable, she must be examined separately on the surrender, just as if the estate in question were an estate at law instead of a mere estate in equity [§ 90].

In case of equitable estate in copyhold the married woman to be separately examined.

Dower Act, 1833.

In the same year we have the Dower Act[1], which revolutionised the subject of dower by placing it completely under the power of the husband. As the act was about to take so much from the widow it began by making her a small present; by § 2 she is to be entitled to dower out of an *equitable* estate of inheritance in possession (other than a joint tenancy) just as if the estate were legal. And the next section is also in her favour, for it enacts that seisin shall not be necessary to give title to dower—the widow may have it out of lands to which the husband was *entitled*

Widows to be entitled to dower out of equitable estates.

Seisin not necessary to give title to dower.

"provided that such dower be sued for or obtained within the period during which the husband's right of entry or action might be enforced."

§ 4. "No widow shall be entitled to dower out of any land which shall have been absolutely disposed of by her husband in his lifetime or by his will."

No dower out of estates disposed of.

§ 5. "All partial estates and interests and all charges created by any disposition or will of a husband, and all

Priority to partial estates, charges, etc.

[1] Stat. 3 and 4 Will. IV. c. 105.

debts, incumbrances, contracts, and engagements to which his land shall be subject or liable, shall be valid and effectual as against the right of his widow to dower."

Dower may be barred by a declaration in a deed.

§ 6. "A widow shall not be entitled to dower out of any land of her husband, when, in the deed by which such land was conveyed to him, or by any deed executed by him, it shall be declared that his widow shall not be entitled to dower out of such land."

Or by a declaration in the husband's will.

§ 7. "A widow shall not be entitled to dower out of any land of which her husband shall die wholly or partially intestate when, by the will of her husband duly executed for the devise of freehold estates, he shall declare his intention that she shall not be entitled to dower out of such land, or out of any of his land."

Dower shall be subject to restrictions.

§ 8. "The right of a widow to dower shall be subject to any conditions, restrictions, or directions, which shall be declared by the will of her husband duly executed as aforesaid."

Devise of real estate to the widow shall bar her dower.

§ 9. "Where a husband shall devise any land out of which his widow would be entitled to dower if the same were not so devised, or any estate or interest therein, to or for the benefit of his widow, such widow shall not be entitled to dower out of or in any land of her said husband, unless a contrary intention shall be declared by his will."

Bequest of personal estate shall not bar dower.

§ 10. "No gift or bequest made by any husband to or for the benefit of his widow of or out of his personal estate, or of or out of any of his land not liable to dower, shall defeat or prejudice her right to dower, unless a contrary intention shall be declared by his will."

§ 13 abolished dower ad ostium ecclesiae and dower ex assensu patris which had long been obsolete.

Inheritance Act, 1833.

The next statute that parliament passed was the Act for the Amendment of the Law of Inheritance[1]. It has already been remarked that the actual rules of descent need not occupy our attention in the present essay. Hence it will be sufficient to say that the present statute laid it down that descent shall always be traced from the

[1] Stat. 3 and 4 Will. IV. c. 106.

last *purchaser*; that the owner is to be considered as the purchaser unless the contrary be proved; that every descent from a brother or sister shall be traced through the parent; that a lineal ancestor shall be heir in preference to collateral persons claiming through him; that the male heir is to be preferred to the female; that on failure of male paternal ancestors the mother of the more remote male ancestor is to be preferred to the mother of the less remote male ancestor; that the half-blood, if on the part of a male ancestor, is to inherit after the whole blood of the same degree, and if on the part of a female ancestor then immediately after her; finally that inheritance shall no longer be prevented by the attainder of the person through whom the descent is traced.

Wills Act, 1837.

One of the earliest acts of Victoria's reign was "An Act for the Amendment of the Laws with respect to Wills[1]." This repealed the Act of Henry VIII. and placed the law as to wills on its present basis.

All realty may be disposed of by will.

All realty, whether the estate be at law or in equity, is made devisable by will, including customary freeholds and copyholds without surrender and before admittance (and although these are not devisable otherwise than by this act). It includes also estates pur autre vie, whether there is a special occupant or not and whatever the nature of the tenure, and whether the hereditament be corporeal or incorporeal. Moreover it extends to all contingent, executory and other future interests and also to property acquired after the execution of the will [§ 3].

Wills of copyholds and customary freeholds to be entered on Court Rolls.

In connection with copyholds it is provided that a copy of the will, or of the part of it dealing with the copyhold, must be entered on the court rolls and that the lord is to be entitled to the same fines and dues on succession of the heir as before the act, and no one can be entitled to admission before payment of these fines [§§ 4 and 5].

Estate pur autre vie.

An estate pur autre vie, not disposed of by will, is to be chargeable in the hands of the heir as assets by descent,

[1] Stat. 7 Will. IV. and 1 Vict. c. 26.

and, if there should be no special occupant, the estate goes to the executor or administrator to be distributed as personalty.

Will of minor or of feme covert invalid.

No will made by an infant is valid; nor by a feme covert except such as were valid before this act [§§ 7 and 8].

Every will to be in writing and signed in presence of two witnesses.

"No will shall be valid unless it shall be in writing and executed in the manner hereinafter mentioned; (that is to say) it shall be signed at the foot or end thereof by the testator, or by some other person in his presence and by his direction; and such signature shall be made or acknowledged by the testator in the presence of two or more witnesses present at the same time, and such witnesses shall attest and shall subscribe the will in the presence of the testator, but no form of attestation shall be necessary" [§ 9].

Appointments by will to be executed like other wills.

Appointments made by will must be executed like other wills and are then valid

"notwithstanding it shall have been expressly required that a will made in exercise of such power should be executed with some additional or other form of execution or solemnity" [§ 10].

Will not void by incompetency of witness. Gifts to attesting witness void.

A will is not to be rendered void by the incompetency of an attesting witness to be admitted to prove the execution of the will. Gifts to an attesting witness or to his wife (or husband) are void; but a creditor attesting a will charging an estate with debts to him is an admissible witness, and so also is an executor.

Will revoked by marriage.

A will is revoked by marriage

"except a will made in exercise of a power of appointment, when the real or personal estate thereby appointed would not in default of such appointment pass to the testator's heir, customary heir, executor, or administrator, or the person entitled as his or her next of kin under the statute of distributions" [§ 18].

But a will cannot be revoked otherwise than by marriage,

except by a new will or codicil or by its wilful destruction[1] [§ 20]. In what cases a will may be revoked.

Every will is to be construed, as to the estate comprised in it, to speak from the death of the testator; and lapsed or void devises fall to the residuary devisee [§§ 24, 25]. Will to speak from death of testator.

A general devise of the testator's lands shall be taken to include copyhold as well as freehold, in the absence of an express intention to the contrary, and a general gift of realty includes property over which the testator has a general power of appointment. What a general devise shall include.

§ 28. "Where any real estate shall be devised to any person without any words of limitation, such devise shall be presumed to pass the fee simple or other the whole estate or interest" (not a mere life estate as formerly) "which the testator had power to dispose of by will in such real estate, unless a contrary intention shall appear by the will." How a devise without words of limitation shall be construed.

§ 29 provides that, in a devise of realty, any words that import a failure of issue of any person shall be construed to mean a failure of issue in the lifetime or at the death of such person, and not an indefinite failure of issue, unless a contrary intention shall appear by the will; while §§ 32, 33 are designed to prevent a lapse in certain cases.

"Where any person, to whom any real estate shall be devised for an estate tail or an estate in quasi entail, shall die in the lifetime of the testator leaving issue who would be heritable under such entail, and any such issue shall be living at the time of the death of the testator, such devise shall not lapse, but shall take effect as if the death of such person had happened immediately after the death of the testator, unless a contrary intention shall appear by the will" [§ 32]. Devises of estates tail shall not lapse.

And "where any person, being a child or other issue of the testator to whom real or personal estate shall be devised or bequeathed for any estate or interest not determinable at or before the death of such person, shall die Gifts to children or other issue who leave issue living at the testator's death shall not lapse.

[1] But a codicil containing provisions independent of the will is not revoked by the destruction of the will. See I. Jarman, *Wills*, p. 125.

in the lifetime of the testator leaving issue, and any such issue of such person shall be living at the time of the death of the testator, such devise or bequest shall not lapse, but shall take effect as if the death of such person had happened immediately after the death of the testator, unless a contrary intention shall appear by the will" [§ 33].

Real Property Act, 1845.

In 1845 came the great "Act to Amend the Law of Real Property[1]." Four years earlier there had been an act abolishing the lease for a year and making a release by deed, *expressed to be made in pursuance of the act*, an effectual mode of conveyance. In 1844 another attempt was made to simplify the transfer of land by enacting that freehold might be conveyed by deed without livery. The Act of 1845 was, however, decisive and final.

Freehold of corporeal tenements to lie in grant.

§ 2. "After the first day of October one thousand eight hundred and forty-five all corporeal tenements and hereditaments shall, as regards the conveyance of the immediate freehold thereof, *be deemed to lie in grant* as well as in livery."

Feoffments, partitions, exchanges, leases, assignments and surrenders to be by deed.

§ 3. "A feoffment made after the said first day of October one thousand eight hundred and forty-five, other than a feoffment made under a custom by an infant, *shall be void at law unless evidenced by a deed*; and a partition and an exchange of any tenements or hereditaments, not being copyhold.....and a surrender in writing of an interest in any tenement or hereditament, not being a copyhold interest and not being an interest which might by law have been created without writing, made after the said first day of October one thousand eight hundred and forty-five, shall be void at law unless made by deed."

Feoffments not to operate by wrong; nor exchanges, etc. to imply any condition, nor 'give' and 'grant' any covenant.

§ 4. "A feoffment made after the said 1st Oct. 1845 shall not have any tortious operation; and an exchange or a partition of any tenements or hereditaments, made by deed executed after the said first day of October, shall not imply any condition in law; and the word 'give' or the word 'grant' in a deed executed after the same day shall not imply any covenant in law in respect of any tenements or

[1] Stat. 8 and 9 Vict. c. 106.

hereditaments, except so far as the word 'give' or the word 'grant' may by force of any Act of Parliament imply a covenant."

§ 5. "That, under an indenture, executed after the first day of October, 1845, an immediate estate or interest, in any tenements or hereditaments, and the benefit of a condition or covenant, respecting any tenements or hereditaments, may be taken, although the taker thereof be not named a party to the same indenture; also that a deed, executed after the said first day of October 1845, purporting to be an indenture, shall have the effect of an indenture, although not actually indented."

Actual indenture not necessary.

§ 6. "After the 1st Oct. 1845 a contingent, an executory and a future interest and a possibility coupled with an interest, in any tenements or hereditaments of *any* tenure, whether the object of the gift or limitation of such interest or possibility be or be not ascertained...may be disposed of by deed; but no such disposition shall by force only of this Act defeat or enlarge an estate tail; and every such disposition by a married woman shall be made conformably to the provisions relative to dispositions by married women of the Fines and Recoveries Act, 1833."

Contingent and other like interests are alienable by deed, saving estates tail.

§ 8. "A contingent remainder existing at any time after the 31st Dec. 1844 shall be, and if created before the passing of this Act shall be deemed to have been, capable of taking effect, notwithstanding the determination by forfeiture, surrender, or merger of any preceding estate of freehold, in the same manner in all respects as if such determination had not happened."

Contingent remainders protected.

§ 9. "When the reversion expectant on a lease, made either before or after the passing of this Act, of any tenements or hereditaments of any tenure shall after the said 1st Oct. 1845 be surrendered or merge, the estate which shall for the time being confer as against the tenant under the same lease the next vested right to the same tenements or hereditaments shall, to the extent and for the purpose of preserving such incidents to and obligations on the same reversion as but for the surrender or merger thereof would have subsisted, be deemed the reversion expectant on the same lease."

When the reversion on a lease is gone, the next estate to be deemed the reversion.

Married Women's Property Act, 1870.

Passing over a quarter of a century during which there was no enactment of the first rank we come in 1870 to the Married Women's Property Act[1]. This is of great importance in the history of the law as to married women, but as it was repealed and replaced by a more comprehensive statute in 1882 there is no need to enter fully into its clauses. Before the Act of 1870 a married woman could enjoy property separately from her husband only by virtue of her right to enforce in equity a trust for her separate use. After that date, however, a trust for the wife's separate use arose *by implication of law* in certain specified cases. Most of these are in the field of personalty, but the eighth section has a bearing on our subject.

Trust for wife's separate use to arise by implication of law in certain cases.

Land coming to married women as heiress of an intestate to be for her separate use.

"Where any freehold, copyhold, or customary property shall descend upon any woman, married after the passing of this Act, as heiress or co-heiress of an intestate, the rents and profits of such property shall, subject and without prejudice to the trusts of any settlement affecting the same, belong to such woman for her separate use, and her receipts alone shall be a good discharge for the same."

Real Property Limitation Act, 1874.

Two important statutes of the year 1874 must now be considered. The first is "An Act for the further limitation of Actions and Suits relating to Real Property[2]."

Period reduced to *twelve* years.

§ 1. "No person shall make an entry or distress or bring an action or suit, to recover any land or rent, but within *twelve* years next after the time at which the right to make such entry or distress, or to bring such action or suit, shall have first accrued to some person through whom he claims; or if such right shall not have accrued to any person through whom he claims, then within twelve years next after the time at which the right to make such entry or distress, or to bring such action or suit, shall have first accrued to the person making or bringing the same."

Effect of disability.

In case of disability through infancy, coverture, idiotcy, lunacy, or unsoundness of mind, six years are allowed from

[1] Stat. 33 and 34 Vict. c. 93. [2] Stat. 37 and 38 Vict. c. 57.

the time when the person has ceased to labour under this disability. However, no time is allowed for absence beyond seas, and thirty years is the utmost period allowable for disabilities.

The other Act of 1874 to which we referred is the "Act to Amend the law of Vendor and Purchaser and further to simplify title to land[1]." Vendor and Purchaser Act, 1874.

§ 1. "In the completion of any contract of sale of land made after the 31st Dec. 1874 and subject to any stipulation to the contrary, forty years shall be substituted as the period of commencement of title which a purchaser may require in place of sixty years, the present period of such commencement; nevertheless earlier title may be required in cases similar to those in which earlier title may now be required." Forty years substituted for sixty as the root of title.

These cases requiring title earlier than sixty years were (*a*) an advowson, for which a hundred years was the period, (*b*) tithes and other property granted from the Crown, for which the original grant could be demanded, and (*c*) a reversion, the creation of which must have been shown.

§ 2. "In the completion of any such contract as aforesaid...recitals, statements and descriptions of facts matters and parties contained in deeds, instruments, Acts of Parliament, or statutory declarations, twenty years old at the date of the contract shall—unless and except so far as they shall be proved to be inaccurate—be taken to be sufficient evidence of the truth of such facts, matters and descriptions." Effect of recital twenty years old.

It should be noted that a recital in a deed is not evidence against those that are not parties to the deed, or have not executed the deed. A recital as to matters of pedigree in a deed executed by deceased members of a family is admitted as evidence, and forms a well-known exception to the general rule excluding hearsay evidence. A recital in a public Act of Parliament is always evidence of the matter recited, whatever the date of the act; but this is not so with a private Act of Parliament.

[1] Stat. 37 and 38 Vict. c. 78.

Before the present act a vendor that could not hand over the title deeds to the purchaser was bound to give him a legal covenant for their production; but now it was enacted that

"the inability of the vendor to furnish the purchaser with a legal covenant to produce and furnish copies of documents of title shall not be an objection to title in case the purchaser will, on the completion of the contract, have an equitable right to the production of such documents."

Estate of bare trustee in fee simple to vest in executor or administrator.

§ 5. "Upon the death of a bare trustee of any corporeal or incorporeal hereditament of which such trustee was seised in fee simple, such hereditament shall vest like a chattel real in the legal personal representative from time to time of such trustee[1]."

Married woman who is bare trustee may convey as feme sole.

§ 6. "When any freehold or copyhold hereditament shall be vested in a married woman as a bare trustee, she may convey or surrender the same as if she were a feme sole."

Non-registration of will in Middlesex etc. cured in certain cases.

§ 8. "When the will of a testator devising land in Middlesex or Yorkshire has not been registered within the period allowed by law in that behalf[2], an assurance of such land to a purchaser or mortgagee by the devisee or by some one devising title under him shall, if registered before, take precedence of and prevail over any assurance from the testator's heir at law."

Land Transfer Act, 1875.

We come next to "An Act to Simplify Titles and Facilitate the Transfer of Land in England[3]." The whole subject of the registration of titles had been dealt with exhaustively by the Real Property Commissioners in 1830, but nothing was done till 1862, when an office of land registry was established. This however had little influence on practice, and the Act of 1875 was drawn up to improve

[1] This was an important change, for formerly the trust estate devolved on the heir or devisee. However, the clause was repealed by the Land Transfer Act of 1875. See p. 212.

[2] i.e. within six months of the death of a testator dying in Great Britain, or within three years from the death of a testator dying upon or beyond the seas.

[3] Stat. 38 and 39 Vict. c. 87.

the machinery of registration, and the reformers returned to the task in 1887, and again in 1897.

The Act of 1875 set up a land registry and invited owners or purchasers to apply to the registrar for the registration of their title. The applicant had various courses open to him, he could seek an absolute, a qualified, or a possessory title:

Absolute title must not be registered without approval of registrar. Possessory title.

"Where an absolute title is required the applicant or his nominee shall not be registered as proprietor of the fee-simple until and unless the title is approved by the registrar. Where a possessory title only is required the applicant or his nominee may be registered as proprietor of the fee-simple on giving such evidence of title and serving such notices, if any, as may for the time being be prescribed" [§ 6].

When the title has been thus entered on the register the proprietor is entitled to claim a land certificate from the registrar.

Title adverse to that of registered proprietor cannot be acquired by length of possession.

§ 21. "A title to any land adverse to or in derogation of the title of the registered proprietor shall not be acquired by any length of possession, but this section shall not prejudice, as against any person registered as first proprietor of land with a possessory title only, any adverse claim in respect of length of possession of any person who was in possession of such land at the time when the registration of such first proprietor took place."

Transfer—how performed.

Once the title has been registered the transfer of the land[1] or land charge is a simple matter. It is completed by the registrar entering on the register the transferee as proprietor of the land in question and the new proprietor may claim a land certificate.

"On the death of the sole registered proprietor, or of the survivor of several joint registered proprietors of any freehold land, such person shall be registered as proprietor in the place of the deceased proprietor or proprietors as may on the application of any person interested in the land be appointed by the registrar, regard being had to the rights

[1] We speak only of freehold: copyhold had long been subjected to a system of registration, viz. entry on the court rolls.

of the several persons interested in such land, and in particular to the selection of such person as may for the time being appear to the registrar to be entitled according to law to be appointed, subject to an appeal to the court in the prescribed manner by any person aggrieved by any order of the registrar under this section" [§ 41].

Trustee in bankruptcy entitled to be registered as proprietor.

On the bankruptcy of a registered proprietor, his trustee is entitled to be registered as proprietor in his place.

Case of married woman.

When a woman whose name is on the register marries, her husband may be registered as co-proprietor, but this will not affect the woman's rights after the death of the husband. And if the husband survives the wife he is not entitled to be registered as sole proprietor of the land:

"but there shall be registered as co-proprietor with him if he is entitled as tenant by the curtesy, and as sole proprietor in place of himself and his deceased wife if he is not entitled as tenant by the curtesy, such person as may on the application of any person interested in right of the wife, be appointed by the registrar,"

with power of appeal, as before, on behalf of any one aggrieved [§ 4].

§ 48 repeals § 5 of the Vendor and Purchaser Act, 1874, and in its place enacts:

In case of lands *not* registered, on death of bare trustee intestate his estate vests like a chattel real.

"that upon the death of a bare trustee intestate as to any corporeal or incorporeal hereditament of which such trustee was seised in fee-simple, such hereditament shall vest like a chattel real in the legal personal representative from time to time of such trustee; but the enactment by this section substituted for the aforesaid section of the V. and P. Act 1874 shall not apply to lands registered under this Act."

Persons interested may lodge a caution with registrar.

§ 60. "Any person having or claiming such an interest in any land which is not already registered as entitles him to object to any disposition thereof being made without his consent may lodge a caution with the registrar to the effect that the cautioner is entitled to notice in the prescribed form, and to be served in the prescribed manner, of any application that may be made for the registration of such land."

In case the registrar is in doubt as to some matter of law or fact that affects the title, he may refer the case to any of the superior courts, and the opinion of the court is conclusive, unless it permits an appeal.

In case of doubt, registrar may refer to any superior court.

The next statute to consider is the "Conveyancing and Law of Property Act, 1881[1]."

Conveyancing Act, 1881.

§ 4. "Where at the death of any person there is subsisting a contract enforceable against his heir or devisee, for the sale of the fee simple or other freehold interest descendible to his heirs general, in any land, his personal representative shall, by virtue of this Act, have power to convey the land for all the estate and interest vested in him at his death, in any manner proper for giving effect to the contract."

General words in conveyances —of land,

§ 6. (1) "A conveyance of *land* shall be deemed to include, and shall by virtue of this Act operate to convey with the land all buildings, erections, fixtures, commons, hedges, ditches, fences, ways, waters, watercourses, liberties, privileges, easements, rights and advantages whatsoever appertaining or *reputed to appertain* to the land, or any part thereof, or at the time of conveyance demised, occupied, or enjoyed with or reputed or known as part or parcel of or appurtenant to the land or any part thereof."

(2) "A conveyance of *land, having houses or other buildings thereon*, shall be deemed to include and shall by virtue of this Act operate to convey with the land, houses, or other buildings, all outhouses, erections, fixtures, cellars, areas, courts, courtyards, cisterns, sewers, gutters, drains, ways, passages, lights, watercourses, liberties, privileges, easements, rights and advantages whatsoever, appertaining or reputed to appertain to the land, houses or other buildings conveyed, or any of them or any part thereof or at the time of conveyance demised, occupied or enjoyed with or reputed or known as part or parcel of or appurtenant to the land, houses or other buildings conveyed or any of them or any part thereof."

—of land having buildings thereon,

(3) "A conveyance of a *manor* shall be deemed to include and shall by virtue of this Act operate to convey with the manor all pastures, feedings, wastes, warrens,

—of a manor.

[1] Stat. 44 and 45 Vict. c. 41.

commons, mines, minerals, quarries, furzes, trees, woods, underwoods, coppices, and the ground and soil thereof, fishings, fisheries, fowlings, courts leet, courts baron, and other courts, view of frank-pledge and all that to view of frank-pledge doth belong, mills, mulctures, customs, tolls, duties, reliefs, heriots, fines, sums of money, amerciaments, waifs, estrays, chief-rents, quit-rents, rents-charge, rents seck, rents of assize, fee-farm rents, services, royalties, jurisdictions, franchises, liberties, privileges, easements, profits, advantages, rights, emoluments, and hereditaments whatsoever, to the manor appertaining or reputed to appertain, or at the time of conveyance demised, occupied, or enjoyed with the same, or reputed or known as part, parcel, or member thereof."

(4) "This section applies only if and so far as a contrary intention is not expressed in the conveyance and shall have effect subject to the terms of the conveyance and to the provisions therein contained."

(5) "This section shall not be construed as giving to any person a better title to any property, right, or thing in this section mentioned than the title which the conveyance gives to him to the land or manor expressed to be conveyed, or as conveying to him any property, right, or thing in this section mentioned, further or otherwise than as the same could have been conveyed to him by the conveying parties."

Powers incident to estate of mortgagee.

§ 19 confers on a mortgagee, when the mortgage is made by deed, the power to sell the mortgaged property when the mortgage money has become due, provided a contrary intention is not expressed in the mortgage deed. The conditions under which this power of sale can be exercised are regulated by § 20; but, if these are fulfilled, the mortgagee is to proceed exactly as under the ordinary power of sale in a deed [§ 21].

Devolution of trust estate on death.

§ 30. "Where an estate or interest of inheritance, or limited to the heir as special occupant, in any tenements or hereditaments corporeal or incorporeal, is vested in any trust or by way of mortgage in any person solely, the same shall, on his death *notwithstanding any testamentary disposition*, devolve to and become vested in his personal representatives or representative for the time being, in like manner as if the same were a

chattel real vesting in them or him; and accordingly all the like powers for one only of several joint personal representatives as well as for a single personal representative, and for all the personal representatives together, to dispose of and otherwise deal with the same, shall belong to the deceased's personal representatives or representative from time to time, with all the like incidents, but subject to all the like rights, equities, and obligations, as if the same were a chattel real vesting in them or him; and for the purposes of this section, the personal representatives for the time being of the deceased shall be deemed in law his heirs and assigns within the meaning of all trusts and powers[1]."

Appointment of new trustees.

§§ 31–38 deal with trustees and executors. Arrangements are made for the retirement of a trustee and the appointment of a new one, and the powers of sale of a trustee are determined in certain cases. We shall not enter into the matter here as these sections have been repealed and replaced by the Trustee Act of 1893 and the subject will be better discussed under the head of equity. §§ 39–40 relate to married women:

Married women—power of court to bind their interests.

"Notwithstanding that a married woman is restrained from anticipation, the court may, if it thinks fit, where it appears to the court to be for her benefit, by judgment or order, with her consent, bind her interest in any property. Also a married woman, whether an infant or not, shall by virtue of this Act have power, as if she were unmarried and of full age, by deed to appoint an attorney on her behalf for the purpose of executing any deed or doing any other act which she might herself execute or do; and the provisions of this Act relating to instruments creating powers of attorney shall apply thereto."

Execution under power of attorney.

§ 46. "The donee of a power of attorney may, if he thinks fit, execute or do any assurance, instrument or thing in and with his own name and signature and his own seal, where sealing is required, by the authority of the donor of the power; and every assurance, instrument, and thing so executed and done shall be as effectual in law to all intents

[1] This section does not apply to copyholds. See Copyhold Act, 1894, § 88, replacing Copyhold Act, 1887, § 45.

as if it had been executed or done by the donee of the power in the name and with the signature and seal of the donor thereof."

§§ 49—64 deal with the construction and effect of deeds and other instruments:—

Use of word 'grant' unnecessary.

§ 49. "It is hereby declared that the use of the word 'grant' is not necessary in order to convey tenements or hereditaments, corporeal or incorporeal."

Conveyance by a person to himself, etc.

§ 50. "Freehold land may be conveyed by a person to himself jointly with another person, by the like means by which it might be conveyed by him to another person; and may, in like manner, be conveyed by a husband to his wife, and by a wife to her husband, alone or jointly with another person."

Words of limitation in fee or in tail.

§ 51. "In a deed it shall be sufficient, in the limitation of an estate in fee-simple, to use the words 'in fee-simple' without the word 'heir'; and in the limitation of an estate in tail, to use the words 'in tail' without the words 'heirs of the body'; and in the limitation of an estate in tail male or in tail female, to use the words 'in tail male' or 'in tail female,' as the case requires, without the words 'heirs male of the body,' or 'heirs female of the body[1].'"

Receipt in deed sufficient.

§ 54. (1) "A receipt for consideration money or securities in the body of a deed shall be a sufficient discharge for the same to the person paying or delivering the same, without any further receipt for the same being indorsed on the deed."

Receipt in deed or indorsed, evidence for subsequent purchaser.

§ 55. (1) "A receipt for consideration money or other consideration in the body of a deed or indorsed thereon shall, in favour of a subsequent purchaser not having notice that the money or other consideration thereby acknowledged to be received was not in fact paid or given, wholly or in part, be sufficient evidence of the payment or giving of the whole amount thereof."

Provision for all the estate, etc.

§ 63. "Every conveyance shall by virtue of this Act be effectual to pass all the estate, right, title, interest, claim and demand which the conveying parties respectively have in, to, or on the property conveyed or expressed or intended so to

[1] This section does not apply to conveyances to corporations.

be, in which they respectively have power to convey in, to, or on the same."

§ 65 supplies a means of converting into a fee simple a term of years originally created for not less than three hundred years and that has at least two hundred years to run[1]. Long terms enlarged into fee simple.

The main object of the act, as expressed in its title, is to simplify modes of assurance, and with the view of comparing modern with older forms, we shall give the model conveyance on sale and marriage settlement as printed in the Fourth Schedule appended to the act:

"*Conveyance on Sale.*

Model Conveyance on Sale. This Indenture made the [ ] day of [ ], between *A* of [ ] of the first part, *B* of [ ] and *C* of [ ] of the second part, and *M* of [ ] of the third part Whereas by an indenture dated [ ] and made between [ ] the lands hereinafter mentioned were conveyed by *A* to *B* and *C* in fee-simple by way of mortgage for securing [£] and interest and by supplemental indenture dated [ ] and made between the same parties those lands were charged by *A* with the payment to *B* and *C* of the further sum of [£] and interest thereon And whereas a principal sum of [£] remains due under the two before mentioned indentures but all interest thereon has been paid as *B* and *C* hereby acknowledge Now this Indenture Witnesseth that in consideration of the sum of [£] paid by the direction of *A* to *B* and *C* and of the sum of [£] paid to *A* those two sums making together the total sum of [£] paid by *M* for the purchase of the fee simple of the lands hereinafter mentioned of which sum of [£] *B* and *C* hereby acknowledge the receipt and of which total sum of [£] *A* hereby acknowledges the payment and receipt in manner before mentioned *B* and *C* as mortgagees and by the direction of *A* as beneficial owner hereby convey and *A* as beneficial owner hereby conveys and confirms to *M* All that [ ] To hold to and to the use of *M* in fee-simple discharged from all money secured by and from all

[1] The term that can be enlarged is described more fully in the C. A., 1882, § 11.

claims under the before mentioned indentures [Add if required, and *A* hereby acknowledges the right of *M* to production of the documents of title mentioned in the schedule hereto and to delivery of copies thereof and thereby undertakes for the safe custody thereof] In witness etc."

"*Marriage Settlement.*

Model Marriage Settlement.

This Indenture made the [ ] day of [ ], between John M. of [ ] of the first part, Jane S. of [ ] of the second part and *X* of [ ] and *Y* of [ ] of the third part Witnesseth that in consideration of the intended marriage between John M. and Jane S. John M. as settler hereby conveys to *X* and *Y* All that [ ] To hold to *X* and *Y* in fee-simple to the use of John M. in fee-simple until the marriage and after the marriage to the use of John M. during his life without impeachment of waste with remainder after his death to the use that Jane S. if she survives him may receive during the rest of her life a yearly jointure rent charge of £ to commence from his death and to be paid by equal half yearly payments the first thereof to be made at the end of six calendar months from his death if she is then living or if not a proportional part to be paid at her death and subject to the beforementioned rent charge to the use of *X* and *Y* for a term of five hundred years without impeachment of waste on the trusts hereinafter declared and subject thereto to the use of the first and other sons of John M. and Jane S. successively according to seniority in tail male with remainder to the use of all the daughters of John M. and Jane S. in equal shares as tenants in common in tail with cross remainders between them in tail with remainder to the use of John M. in fee simple. [Insert trusts of term of five hundred years for raising portions; also, if required, power to charge jointure and portions on a future marriage; also powers of sale, exchange, and partition, and other powers and provisions if and as desired.] In witness etc."

Settled Land Act, 1882.

The following year gave us the Settled Land Act, 1882[1], which introduced many important changes by enabling a 'tenant for life' of settled land to dispose of a larger estate than his own.

[1] Stat. 45 and 46 Vict. c. 38.

§ 3. A tenant for life beneficially entitled in *possession* Powers to tenant for life to sell.

(i) "May sell the settled land or any part thereof or any easement right or privilege of any kind over or in relation to the same; and

(ii) Where the settlement comprises a manor—may sell the seignory of any freehold land within the manor or the freehold and inheritance of any copyhold or customary land, parcel of the manor, with or without any exception or reservation of all or any mines or minerals, or of any rights or powers relative to mining purposes, so as in every such case to effect an enfranchisement; and Case of manor.

(iii) May make an exchange of the settled land or any part thereof, for other land, including an exchange in consideration of money paid for equality of exchange; and May exchange.

(iv) Where the settlement comprises an undivided share in land, or under the settlement the settled land has come to be held in undivided shares,—may concur in making partition of the entirety, including a partition in consideration of money paid for equality of partition." May concur in partition.

§ 15. "Notwithstanding anything in this Act, the principal mansion-house on any settled land, and the demesnes thereof[1] and other lands usually occupied therewith, shall not be sold or leased by the tenant for life, without the consent of the trustees of the settlement, or an order of the court." Restriction as to mansion-house, park, etc.

§ 20. (1) "On a sale, exchange, lease, mortgage, or charge, the tenant for life may, as regards lands sold, given in exchange or on petition, leased, mortgaged or charged or intended so to be, including copyhold or customary or leasehold land vested in trustees, or as regards easements or other rights or privileges sold or leased, or intended so to be, convey or create the same by deed, for the estate or interest the subject of the settlement or for any less estate or interest, to the uses and in the manner requisite for giving effect to the sale, exchange, partition, lease, mortgage, or charge." Completion of sale, lease etc. by conveyance.

(2) "Such a deed, to the extent and in the manner to and in which it is expressed or intended to operate and can What may be conveyed.

[1] By the Settled Land Act, 1890 [52 and 53 Vict. c. 36, s. 10] the phrase "pleasure grounds and park and land (if any) usually occupied therewith" was substituted for "the demesnes thereof," and a restriction on exchange was added to that on sale or lease.

operate under this Act, is effectual to pass the land conveyed, or the easements, rights, or privileges created, discharged from all the limitations, powers, and provisions of the settlement, and from all estates, interests, and charges subsisting or to arise thereunder, but subject to and with the exception of—

Exceptions.

(i) All estates, interests, and charges having priority to the settlement; and

(ii) All such other, if any, estates, interests, and charges as have been conveyed or created for securing money actually raised at the date of the deed; and

(iii) All leases and grants at fee-farm rents or otherwise, and all grants of easements, rights of common, or other rights or privileges granted or made for value in money or money's worth, or agreed so to be, before the date of the deed, by the tenant for life, or by any of his predecessors in title, or by any trustees for him or them, under the settlement, or under any statutory power, or being otherwise binding on the successors in title of the tenant for life."

Case of copyhold.

(3) "In case of a deed relating to copyhold or customary land, it is sufficient that the deed be entered on the court rolls of the manor, and the steward is hereby required on production to him of the deed to make the proper entry, and on that production, and on payment of customary fines, fees, and other dues or payments, any person whose title under the deed requires to be perfected by admittance shall be admitted accordingly; but if the steward so requires, there shall also be produced to him so much of the settlement as may be necessary to show the title of the person executing the deed; and the same may, if the steward thinks fit, be also entered on the court rolls."

Tenant for life must obtain best price possible.

The tenant for life is in the position of a trustee for others entitled under the settlement [§ 53], and in selling or exercising other powers under the act he must obtain the best price and conditions possible [§ 4]. But any failure in this respect, although it will render him liable to the others for whom he is a quasi trustee, will not invalidate the sale or other conveyance.

"On a sale, exchange, partition, lease, mortgage, or charge,

a purchaser, lessee, mortgagee or other person dealing in good faith with a tenant for life shall, as against all parties entitled under the settlement, be *conclusively* taken to have given the best price, consideration, or rent as the case may require, that could reasonably be obtained by the tenant for life and to have complied with all the requisitions of this Act" [§ 54]. General protection of purchasers.

Where the 'tenant for life' is an infant, the powers given by this act may be exercised by the trustees of the settlement: Where tenant for life is an infant.

"and if there are none, then by such person and in such manner as the court, on the application of a testamentary or other guardian or next friend of the infant, either generally or in the particular instance, orders" [§ 60].

A married woman who is 'tenant for life' may exercise the powers of this act independently of her husband, and a restraint on anticipation in the settlement shall not prevent her from so doing [§ 61]. Married woman.

§ 62. "Where a tenant for life, or a person having the powers of a tenant for life under this Act, is a lunatic, so found by inquisition, the committee of his estate may, in his name and on his behalf, under an order of the Lord Chancellor, or other person intrusted by virtue of the Queen's sign manual with the care and commitment of the custody of the persons and estates of lunatics, exercise the powers of a tenant for life under this Act, and the order may be made on the petition of any person interested in the settled land, or the committee of the estate." Lunatic.

We must next examine the important "Act to Consolidate and Amend the Acts relating to the Property of Married Women" whose short title is the "Married Women's Property Act, 1882[1]." Married Women's Property Act, 1882.

§ 1. (1) "A married woman shall, in accordance with the provisions of this Act, be capable of acquiring, holding and disposing by will or otherwise of any real [or personal] property as her separate property in the same manner as if she were a feme sole, without the intervention of any trustee." Married woman capable of acquiring, holding and disposing of property like a feme sole.

[1] Stat. 45 and 46 Vict. c. 75.

Property of a married woman after this act to be held by her as a feme sole.

§ 2. "Every woman who marries after the commencement of this Act[1] shall be entitled to have and to hold as her separate property and to dispose of in manner aforesaid all real and personal property which shall belong to her at the time of marriage or shall be acquired by or devolve upon her after marriage."

§ 5. "Every woman married before the commencement of this Act shall be entitled to have and to hold and to dispose of in manner aforesaid as her separate property all real and personal property, her title to which, whether vested or contingent, and whether in possession, reversion or remainder, shall accrue after the commencement of this Act[2]."

Saving of existing settlements, and the power to make future settlements.

§ 19. "Nothing in this Act contained shall interfere with or affect any settlement or agreement for a settlement made or to be made, whether before or after marriage, respecting the property of any married woman, or shall interfere with or render inoperative any restriction against anticipation at present attached or to be hereafter attached to the enjoyment of any property or income by a woman under any settlement, agreement for a settlement, will or other instrument."

Lastly, in 1897, we reach "An Act to establish a Real Representative and to amend the Land Transfer Act, 1875[3]."

Land Transfer Act, 1897. Devolution of legal interest in real estate on death.

§ 1. (1) "Where real estate is vested in any person without a right in any other person to take by survivorship[4] it shall, on his death, notwithstanding any testamentary disposition, devolve to and become vested in his personal representatives or representative from time to time as if it were a chattel real vesting in them or him."

(2) "This section shall apply to any real estate over which a person executes by will a general power of appointment, as if it were real estate vested in him."

[1] i.e. 1st Jan. 1883. See § 25 of the act.

[2] It was decided, after some conflict, that this section is limited in its operation to property the title to which *first* accrues on or after Jan. 1st, 1883: see *Reid v. Reid*, 31 Ch. D. 402.

[3] Stat. 60 and 61 Vict. c. 65: *ante*, p. 210.

[4] Note that this excludes estates tail and estates for life. Trust estates are also not included, they devolve in accordance with § 30 of the Conveyancing Act of 1881.

(3) "Probate and letters of administration may be granted in respect of real estate only, although there is no personal estate."

(4) "The expression 'real estate' in this part of the Act shall not be deemed to include land of copyhold or customary tenure in any case in which an admission on any act by the lord of the manor is necessary to perfect the title of a purchaser from the customary tenant." Copyhold excluded in certain cases.

(5) "This section applies only in cases of death after the commencement of this Act."

§ 2. (1) "Subject to the powers, rights, duties, and liabilities hereinafter mentioned, the personal representatives of a deceased person shall hold the real estate as trustees for the persons by law beneficially entitled thereto, and those persons shall have the same power of requiring a transfer of real estate as persons beneficially entitled to personal estate have of requiring a transfer of such personal estate." Removal of executor, provisions as to administration.

§ 3. (1) "At any time after the death of the owner of any land, his personal representatives may assent to any devise contained in his will, or may convey the land to any person entitled thereto as heir, devisee, or otherwise, and may make the assent or conveyance, either subject to a charge for the payment of any money which the personal representatives are liable to pay, or without any such charge; and on such assent or conveyance, subject to a charge for all moneys (if any) which the personal representatives are liable to pay, all liabilities of the personal representatives in respect of the land shall cease, except as to any acts done or contracts entered into by them before such assent or conveyance." Provision for transfer to heir or devisee.

(2) "At any time after the expiration of one year from the death of the owner of any land, if his personal representatives have failed on the request of the person entitled to the land to convey the land to that person, the court may, if it thinks fit, on the application of that person, and after notice to the personal representatives, order that the conveyance be made, or, in the case of registered land, that the person so entitled be registered as proprietor of the land, either solely or jointly with the personal representatives."

(4) "The production of an assent in the prescribed form by the personal representative of a deceased proprietor of

registered land shall authorise the registrar to register the person named in the assent as proprietor of the land."

Appropriation of land in satisfaction of legacy or share in estate.

§ 4. (1) "The personal representatives of a deceased person may, in the absence of any express provision to the contrary contained in the will of such deceased person, with the consent of the person entitled to any legacy given by the deceased person or to a share in his residuary estate, or, if the person entitled is a lunatic or an infant, with the consent of his committee, trustee, or guardian, appropriate any part of the residuary estate of the deceased in or towards satisfaction of that legacy or share, and may for that purpose value in accordance with the prescribed provisions the whole or any part of the property of the deceased person in such manner as they think fit. Provided that before any such appropriation is effectual, notice[1] of such intended appropriation shall be given to all persons interested in the residuary estate, any of whom may thereupon within the prescribed time apply to the court, and such valuation and appropriation shall be conclusive save as otherwise directed by the court."

(3) "In the case of registered land, the production of the prescribed evidence of an appropriation under this section shall authorize the registrar to register the person to whom the property is appropriated as proprietor of the land."

Registration.

§§ 6—23 deal with the subject of Registration and are to be read with the Land Transfer Act of 1875[2].

Title adverse to registered one, not to be acquired by length of possession. Proviso.

§ 12. "A title to registered land adverse to or in derogation of the title of the registered proprietor shall not be acquired by any length of possession, and the registered proprietor may at any time make an entry or bring an action to recover possession of the land accordingly. Provided that when a person would, but for the provisions of the principal Act [of 1875] or of this section, have obtained a title by possession to registered land, he may apply for an order for rectification of the register under section ninety-five of the principal Act, and on such application the court may, subject to any estates or rights acquired by registration for valuable

[1] This notice becomes part of the title to the appropriated land.

[2] See p. 210.

consideration in pursuance of the principal Act or this Act, order the register to be rectified accordingly. And provided also that this section shall not prejudice, as against any person registered as first proprietor of land with a possessory title only, any adverse claim in respect of length of possession of any other person who was in possession of such land at the time when the registration of such first proprietor took place."

Evidence of title that may be required by purchaser.

§ 16. "A purchaser of registered land shall not require any evidence of title except:—

(i) the evidence to be obtained from an inspection of the register or of a certified copy or extract from the register;

(ii) a statutory declaration as to the existence or otherwise of matters which are declared by § 18 of the principal Act and by this Act not to be incumbrances[1];

(iii) if the proprietor of the land is registered with an absolute title, and there are incumbrances entered on the register as subsisting at the first registration of the land, either evidence of the title to these incumbrances, or evidence of their discharge from the register;

(iv) where the proprietor of the land is registered with a qualified title, the same evidence as above provided in the case of absolute title, and such evidence as to any estate, right, or interest excluded from the effect of the registration as a purchaser would be entitled to if the land were unregistered;

(v) if the land is registered with a possessory title such evidence of the title subsisting or capable of arising at the first registration of the land as the purchaser would be entitled to if the land were unregistered."

Compulsory registration.

Finally we come to an important innovation in the nature of an arrangement for the *compulsory* registration of title.

How made so.

§ 20. (1) "Her Majesty the Queen may, by order in Council, declare as respects any county or part of a county mentioned or defined in the order, that, on and after a day specified in the order, registration of title to land is to be

[1] The chief of these in the field of realty are: rights of common, of way, and other easements; rights to mines and minerals; rights of fishing and sporting; seignorial and manorial rights of all descriptions.

compulsory on sale, and thereupon a person shall not, under any conveyance on sale executed on or after the day so specified, acquire the legal estate in any freehold land in that county, or part of a county, unless or until he is registered as proprietor of the land."

What is 'land' within meaning of this act. Exceptions.

§ 24. (1) "All hereditaments, corporeal and incorporeal, shall be deemed land within the meaning of the principal Act and this Act, except that nothing in this Act shall render compulsory the registration of the title to an incorporeal hereditament, or to mines or minerals apart from the surface [or to a lease having less than forty years or two lives yet to fall in], or to an undivided share in land, or to freeholds intermixed and indistinguishable from lands of other tenure, or to corporeal hereditaments, parcel of a manor, and included in a sale of the manor as such."

Meaning of 'personal representative.'

(2) "In this Act the expression 'personal representative' means an executor or administrator."

§ 25. "This Act shall come into operation on January 1st, 1898."

CHAPTER IX.

FIFTH PERIOD CONCLUDED. THE LAW AS IT STANDS TO-DAY.

THE survey of the great legislative changes of the present period which occupied our attention in the preceding chapter has placed us in a position to consider the various titles in vogue at the present day. Repeated efforts have been made to simplify the methods of conveyance, and much of the complexity of earlier modes has been removed. Two somewhat venerable forms—fines and recoveries—have disappeared altogether[1], and the remaining ones have been stripped of much of their former prolixity by such statutes as the Conveyancing Act of 1881[2]. Further than this, as a matter of practice a deed of grant and an appointment under a power are now almost the only forms employed, the others being rarely met with except in abstracts of title. However, none of these changes saves the conveyancer from the labour of learning something of the earlier forms of transfer, for without some historical knowledge the nature and effect of the modern simplified forms cannot be properly understood.

Efforts to simplify conveyances.

As to modes of conveyance inter vivos, a feoffment with livery of seisin is still an effectual method of transference. Until 1845 it was regularly used for conveyances by corporations, as there was some doubt

Feoffment.

[1] See Fines and Recoveries Act, 1833, *ante*, p. 195.

[2] *Ante*, p. 213.

whether a corporation could be seised to a use; and, indeed, some corporations still use the feoffment. However the Real Property Act, 1845[1], made the feoffment void unless evidenced by deed[2], so that from that date it has disappeared from ordinary practice. Now that a deed is necessary the feoffment is more cumbrous than a deed of grant. Nor is there any such advantage as that described in Sheppard's *Touchstone*[3], for the Act of 1845[4] did away with the tortious operation of a feoffment. Thus it has come about that this "most antient and most solemn" mode of conveyance is now used only for conveyances by infants under the custom of gavelkind, in which case there is no need of a deed[5].

Exchange.

Title by exchange is dealt with by the Law of Property Act of 1845[6] by which it is enacted that

"a partition and an exchange of any tenements or hereditaments, *not being copyhold*,...shall be void at law unless evidenced by a deed."

Consequently exchanges are now usually effected by mutual deeds of grant, so that the exchange as a separate mode of conveyance may be said to have disappeared.

Confirmation.

As to a confirmation the law is the same as in the preceding period. The confirmation must be made by a deed duly sealed and delivered, hence a deed of grant might equally well be used.

Surrender.

In previous periods we have spoken of a surrender as a means of conveyance, and nothing need be added to the former accounts except that a deed is now required to give validity to the surrender

"of any interest in any tenements or hereditaments *not being a copyhold interest*, and not being an interest which might by law have been created without writing[7]."

Little need be added to the former accounts of assurances operating by the Statute of Uses. The

[1] *Ante*, p. 206. [2] Ibid. § 3. [3] *Ante*, p. 151.
[4] Real Property Act, 1845, § 4. [5] Ibid. § 3.
[6] Ibid. § 3, *ante*, p. 206. [7] Ibid. § 3.

covenant to stand seised and the bargain and sale remain just as before, but are rarely employed. Lease and release was the most popular mode of conveyance during the preceding period. The chief objection to it was that two distinct instruments were required and the common law made a deed essential. In 1841 an effort was made to simplify matters by doing away with the necessity for a lease and enacting that every deed or instrument of release of a freehold, expressed to be made in pursuance of the act, should be as effectual as a lease and release[1].

Deed of grant.

Conveyance by statutory release was not destined to remain long in possession of the field. In 1845 the legislature cut boldly at the root of old feudal notions and declared that

"all corporeal tenements and hereditaments shall, as regards the conveyance of the immediate freehold thereof, be deemed to lie in grant as well as in livery[2]."

In consequence of this the deed of grant, which was formerly restricted to the conveyance of *incorporeal* hereditaments, has now practically superseded all other forms except a bargain and sale and an appointment under a power. The actual arrangement of the deed of grant is merely a matter of custom and convenience. In form it is usually an indenture, but a deed poll may also be employed. In practice the deed is nearly always dated, but the fact of there being no date or an impossible date does not invalidate the instrument, and the deed takes effect from the time of its delivery and not of its date.

Parties.

The parties to the deed are indicated by their names and such description as is necessary to identify them. Before the Act of 1845 no person could take an immediate benefit under an indenture unless he were named as one of the parties thereto, and, although this has been changed[3], the practice of making every person that takes

[1] Stat. 4 and 5 Vict. c. 21. Repealed by the Statute Law Revision Act, 1874.

[2] 8 and 9 Vict. c. 106, § 2.

[3] Ibid. § 5.

an immediate estate or interest in any hereditaments a party to the indenture is still maintained.

Recitals.

After the description of the parties come, as a rule, the recitals; but these are often omitted in simple cases, their object being to explain the scope and aim of the deed. When inserted care must be taken to ensure accuracy, for if they deal with matters twenty years old at the date of the contract they are taken to be sufficient evidence of the truth of such matters[1], and, moreover, the vendor is estopped from setting up any title incompatible with what he has laid down in the recital. After the recital a statement of the consideration is made; although if there has been consideration this may be proved notwithstanding that the statement has been omitted from the deed. However, it is important to notice that some consideration is necessary to prevent (*a*) a resulting use[2], (*b*) the avoidance of the conveyance by creditors or by a subsequent purchaser for value and without notice[3], (*c*) a fine for not setting forth the consideration[4]. The statement of the consideration is generally followed by a simple receipt clause, "the receipt whereof is hereby acknowledged." This is sufficient evidence of payment[5]; but there must be something more than a general statement that consideration has been given, specific sums or items must be mentioned[6]. Before the Act of 1881 a receipt did not prevent the person that acknowledged it from showing in Equity that he had not been paid[7].

Consideration.

[1] See § 2 of Vendor and Purchaser Act, 1874, *ante*, p. 209. This rule of law seems to have been extended by the decision in *Bolton v. London School Board*, 7 Ch. D. 766; but the ruling in that case seems doubtful. See also *Re Marsh and Earl Granville*, 24 Ch. D. 11.

[2] *Ante*, p. 182.

[3] See Bankruptcy Act, 1883 [46 and 47 Vict. c. 52, § 47].

[4] The Stamp Act, 1870, requires that the consideration be truly set forth under a penalty of £10.

[5] See *Lloyd's Bank v. Bullock*, 1896, 2 Ch. 192.

[6] See *Renner v. Tolley*, W. N. 1893, 90.

[7] See *Winter v. Lord Anson*, 3 Russ. 488; *Stratton v. Rastall*, 2 T. R. 366; *Kennedy v. Green*, 3 My. and K. 699, 716.

Following the receipt come the operative words of the conveyance, e.g. "*A*, as beneficial owner, hereby grants to the said *B* etc." Formerly there were a great number of operative words at the disposal of the conveyancer, each with a distinctive meaning and apt use; but any phraseology that clearly indicates the intention to convey will do, although of course certain words are usual[1]. The parcels or description of the subject of the conveyance are generally inserted in the operative part of the deed; but in some cases they appear in the recitals. The description is frequently given with the aid of a schedule to the deed and a map drawn on the deed itself. Before 1882 it was the practice to add to the description a number of 'general words' with the object of insuring the conveyance of reputed rights and easements and profits *à prendre* enjoyed with the land. These general words are now omitted in reliance on the Conveyancing Act of 1881[2], and the same Act[3] has also done away with the 'all estate' clause to be found in earlier deeds.

Operative words.

Parcels.

After the description of the property comes the *habendum* clause[4] which marks out the estate to be taken by the grantee, e.g. "to hold to *A* and his heirs" or "to hold to *A* in fee simple." Formerly the clause read "to have and to hold," the *tenendum* being of use to show whether the grantee was to hold of the grantor or of his lord; but since Quia Emptores[5] this distinction is useless. We have already had occasion to lay stress on the fact that in earlier deeds it was most important to use the proper technical words of limitation. This is still true, but the Conveyancing Act of 1881[6] has shortened the

Habendum clause.

[1] By § 49 of C. A. 1881, *ante*, p. 216, there is no necessity to use the word *grant*, except where it implies covenants under Acts of Parliament [Land Clauses Consolidation Act, 1845 (8 and 9 Vict. c. 18, § 132); Queen Anne's Bounty Act, 1838 (1 and 2 Vict. c. 20, § 22)].

[2] § 6, see *ante*, p. 213. [3] Ibid. § 63.

[4] All the parts of the deed before the habendum are classed together and called the 'premises.'

[5] *Ante*, p. 109.

[6] § 51, see *ante*, p. 216. The section does not apply to corporations, the proper form of limitation for a fee simple to a corporation sole being

expressions necessary to create estates in fee simple, fee tail, etc.

Declaration of trusts.

If the grant is to some other use than that of the grantee the *habendum* is followed by the declaration of uses or of trusts, but this declaration may be made by a separate instrument. After the declaration of uses come the covenants for title (if any); but the ordinary covenants are usually dispensed with in virtue of the Conveyancing Act of 1881[1].

Testimonium.

The document ends with the *testimonium* and attestation clauses; i.e. the acknowledgment of the deed as that of the parties named, with their signatures and seals. If there are any witnesses they append their signatures to a clause endorsed on the deed and attesting its execution.

This somewhat lengthy description has been rendered necessary by the fact, already noted, that the deed of grant is now by far the most important means of conveyance of land inter vivos. A model conveyance has already been transcribed from the Conveyancing Act, 1881[2]. The following is a slightly modified form of conveyance of a freehold by the beneficial owner:

Form of conveyance.

"This Indenture made the — day of — 19—. Between —— of ——, hereinafter called the vendor of the one part, and —— of ——, hereinafter called the purchaser of the other part.

Whereas the vendor is now seised in fee simple in possession free from incumbrances of the hereditaments hereinafter conveyed, and has agreed to sell the same to the purchaser for the like estate in possession free from the incumbrances at the price of £—

Now This Indenture Witnesseth that in pursuance of the said agreement, and in consideration of the sum of £— paid by the purchaser to the vendor (the receipt of which sum the vendor hereby acknowledges), The Vendor as beneficial owner hereby conveys unto the purchaser All that &c. . . .

"to *A* and his successors," and to a corporation aggregate "to *A* and their assigns"; but the word 'successors' may also be used in this case. See Land Clauses Consolidation Act, 1845.

[1] § 7. [2] *Ante*, p. 217.

situated &c. containing &c. or thereabouts, and more particularly described in the [first] schedule hereto, and intended to be delineated on the plan on these presents and to be therein edged—To Hold unto and to the use of the purchaser in fee simple.

In Witness etc."[1]

It is a general rule that a person under no disability[2] may convey away any interest to which he is entitled; but he cannot as a rule give a better title than he has, nor convey more than he possesses. However, although, generally speaking, any attempt to give a larger estate than that of the alienor is ineffectual, there are cases in which this can be done provided the proper means are employed. The most important of these are the enlargement of a fee tail into a fee simple by the tenant in tail, the powers of disposition of a tenant for life of settled land, and of other limited owners, and the enlargement of the residue of a long term of years into a fee simple. These each require special consideration, as the modes of conveyance hitherto dealt with in this chapter are appropriate to conveyances by persons absolutely entitled to the freehold.

Tenant in tail.

As the statute De Donis is still in force, a tenant in tail cannot effectually pass the fee simple by an ordinary conveyance[3]. The methods of barring the entail by a fine or recovery were described at length at an earlier stage, but these were swept away by the Fines and Recoveries Act, 1833[4]. The provisions of that act, in so far as they bear directly on title, have been set out in the last chapter[5] and need not be repeated here. In effect the act gave to the tenant in tail as wide powers of disposition as if he were tenant in fee simple, the main differences being

[1] See Wolstenholme's *Conveyancing Forms*, p. 155.

[2] See *post*, p. 240 et seq.

[3] Such a conveyance would pass to the purchaser an estate in fee determinable on the death of the tenant in tail by the entry of the issue, or of the remaindermen, or reversioner.

[4] Stat. 3 and 4 Will. IV. c. 74.

[5] *Ante*, p. 195 et seq.

that, if there were a protector of the settlement, the consent of the protector was necessary to pass the fee simple[1], and that the conveyance must be effected by deed duly enrolled in the Chancery Division of the High Court[2] within six months after its execution by the vendor. Here is a short form of disentailing deed without recitals:

"This Indenture made under the — day of — 19—, Between [tenant in tail] of, &c., of the one part; and [grantee to uses] of, &c., of the other part; Witnesseth that the said [tenant in tail] hereby grants unto the said [grantee] and his heirs; All and Singular the messuages, lands, and hereditaments in England or Wales of or to which he the said [tenant in tail] is seised or entitled, at law or in equity, for any estate in tail male or in tail under an indenture dated, &c., and made between [parties], being a settlement made in consideration of the marriage which was shortly afterwards solemnized between [*A*, *B*] and [*C*, *B*], both since deceased, the late father and mother of the said [tenant in tail] or otherwise, To Hold the same Unto the said [grantee] and his heirs, freed and discharged from all estates in tail male or in tail of the said [tenant in tail], at law or in equity, and from all estates, rights, interests, and powers, to take effect after the determination or in defeazance of such estates in tail male or in tail, To the Use of the said [tenant in tail], his heirs and assigns for ever.

In Witness, &c."[3]

Quasi entail.

If an estate pur autre vie be given to a person and the heirs of his body, what is called a *quasi entail* is created, and this estate is subject to the rules of descent of an estate tail. But the Fines and Recoveries Act does not refer to quasi entails, and these may be barred by other means than those laid down by that act. The owner of such an estate may, if in possession, bar his issue and all remainders by an ordinary deed of conveyance.

[1] Without the consent of the protector nothing more than a *base fee* can be conferred.

[2] In "Chancery" at the time of the act.

[3] Bythewood's *Precedents*, vi. 782.

If, however, the estate be in remainder expectant on an estate for life, then the concurrence of the tenant for life in possession is necessary to bar the subsequent remaindermen; without this concurrence no more than a quasi base fee can be created[1].

Powers of tenant for life of settled lands.

It was long usual in settlements to give the tenant for life powers of sale, subject to various restrictions, over the settled lands, but these express powers are now generally omitted in reliance on modern statutory powers. A number of Acts of Parliament have been directed to the object of enlarging the powers of the tenant for life. The Settled Estates Act, 1877[2], gave the Court power to authorise sales of settled estates and made a conveyance under the act operate as if the alienor had been specially empowered by a clause in the settlement. The machinery of this act was not found to work very satisfactorily and so the Settled Land Act, 1882[3], was passed. This great act contains the main body of the law as to dispositions of settled land, although there are several explanatory and amending acts[4]. Its general effect is to give to the owner for the time being "beneficially entitled to possession[5]" wide powers of disposition for the benefit of all parties entitled under the settlement[6], and in fact a tenant for life of settled lands has now, as a rule, almost as extensive powers of dealing with the property as a prudent owner would care to exercise. He may grant various leases for agricultural, mining, and building purposes or he may sell the whole or any part of the estate

[1] See *Allen v. Allen*, 2 Dr. and War. 307 et seq.

[2] Stat. 40 and 41 Vict. c. 18. This replaced an act of 1856.

[3] Stat. 45 and 46 Vict. c. 38.

[4] The Settled Land Act, 1884 [47 and 48 Vict. c. 18]; The Settled Land Acts (Amendment) Act, 1887 [50 and 51 Vict. c. 30]; The Settled Land Act, 1889 [52 and 53 Vict. c. 36]; The Settled Land Act, 1890 [53 and 54 Vict. c. 69].

[5] "Possession" here includes receipt of rents and profits. Thus a tenant for life does not lose his powers by a lease.

[6] It is very important to ascertain what instruments constitute the "settlement" (defined in § 2), for on this depend the powers of disposition of the tenant for life.

at his own discretion[1], except only that in disposing of the principal mansion-house and the pleasure-grounds and parks usually occupied therewith he requires the consent of the trustees of the settlement or an order of the Court. However, as the various powers of disposition and the mode of exercising them were described in the last chapter there is no necessity to add much here. It may be noted that the motive of the tenant for life in effecting a sale under the act is immaterial, that is, it will not affect the validity of the sale, although the tenant, as trustee[2], will be responsible for any improper exercise of his powers. The powers of the tenant for life are not assignable; they cease on a release to the immediate remainderman in fee or when there is a complete disentail. In case the powers of the trustees under the settlement should conflict with the statutory powers of the tenant for life it is enacted that the consent of the tenant for life is necessary to the exercise by the trustees of any power, conferred by the settlement, that might be exercised in virtue of the act[3].

Powers extended to other limited owners.

It should be noticed that all the powers of a tenant for life under the Settled Land Act, 1882, are also expressly conferred on several other limited owners entitled in possession[4]. Of these the chief are:—(*a*) a tenant in fee simple, with an executory limitation over, on failure of his issue, or in any other event; (*b*) a person entitled to a base fee; (*c*) a tenant for years determinable on life, not holding merely under a lease at a rent; (*d*) a tenant for the life of another not holding merely under a lease at a rent; (*e*) a tenant for his own or any other life, or for years determinable on life, whose estate is liable to cease or be defeated in any event during that life, or is subject to a trust for accumulation of income, (*f*) a tenant in tail after possibility of issue extinct, (*g*) a tenant by the curtesy, (*h*) a person entitled to the income of land under

[1] § 3; but every sale must be made at the best price that can reasonably be obtained, § 4.

[2] § 53. [3] § 56 (2). [4] § 58 (ii.—ix.).

a trust or direction for payment thereof to him during his own or any other life, or until sale of the land, or forfeiture of his interest therein.

Other powers conferred on limited owners.

In addition to these powers conferred by the Settled Land Acts, limited owners are also empowered by a number of statutes to sell for various specific purposes, e.g. (*a*) for sites for schools[1], churchyards[2], and places of religious worship[3], (*b*) to meet the expenses of inclosure under the Commons Inclosure Acts[4], (*c*) to free estates from land tax under the Land Tax Redemption Acts[5], (*d*) for defence of the realm[6]. And by the Land Clauses Consolidation Act, 1845[7], limited owners are empowered to sell land to the promoters of an undertaking of a public nature which is authorised by a special Act of Parliament in which the Act of 1845 is incorporated.

Statutory powers of sale by mortgagees.

Before 1881 mortgage deeds usually contained powers of sale enabling the mortgagee to sell the property mortgaged if payment were not made at a specified time. By Lord Cranworth's Act, 1860[8], a power of sale became incident to every mortgage made by deed after the passing of the act, unless a contrary intention were declared by the deed. This provision was, however, seldom relied on in practice and it was repealed by the Conveyancing Act, 1881[9]. The powers of sale conferred on the mortgagee by that act have been given in the last chapter[10].

The other example of the granting of a larger estate than one possesses is the conversion into a fee simple of the residue of a long term of years. This is permitted in cases where it is practically impossible that

[1] Stats. 4 and 5 Vict. c. 38; 12 and 13 Vict. c. 49.

[2] Stat. 30 and 31 Vict. c. 133.

[3] Stats. 36 and 37 Vict. c. 50; 45 and 46 Vict. c. 21.

[4] A very large number of these acts were passed in Victoria's reign. Cp. p. 155.

[5] Stats. 1 and 2 Vict. c. 57; 16 and 17 Vict. cc. 74, 117 and earlier acts of reign of Geo. III.

[6] Stats. 5 and 6 Vict. c. 94; 18 and 19 Vict. c. 117; 23 and 24 Vict. c. 112.

[7] Stat. 8 and 9 Vict. c. 18. [8] Stat. 23 and 24 Vict. c. 145.

[9] Stat. 44 and 45 Vict. c. 41, § 71. [10] See *ante*, p. 214.

evidence of title to the reversion could exist when the term of years runs out, or where the reversion would be practically valueless. The method of effecting the enlargement in the preceding period was by means of a tortious feoffment[1], but this was rendered impossible by the Real Property Act, 1845[2]. Now by the Conveyancing Act, 1881[3], the term may be enlarged into a fee simple by a declaration in a deed.

"Thereupon the term shall become and be enlarged accordingly, and the person in whom the term previously vested shall acquire and have in the land a fee simple instead of the term[4]."

Bankruptcy.

The operation of the law of bankruptcy was discussed in the preceding period[5] and a large number of Acts of Parliament dealing with the subject were referred to. Legislation as to bankrupts continued active in the present period, but the earlier statutes[6] need not be considered, as the law now in force is contained in the Bankruptcy Acts, 1883 and 1890[7]. Under these acts, when bankruptcy proceedings have been instituted, the Court may make a receiving order whereby the Official Receiver is made receiver of the debtor's property. A general meeting of creditors is held, and after this the Court may adjudge the debtor a bankrupt[8]. His property then becomes divisible among the creditors and vests without any conveyance in a trustee appointed to administer the estate. This trustee is appointed by the creditors, but his appointment must be approved and certified by the Board of Trade; and until his appointment the Official Receiver is the trustee for the purposes of the act. The title of the trustee relates back to the

[1] *Ante*, p. 152. [2] Stat. 8 and 9 Vict. c. 106, § 4. *Ante*, p. 206.
[3] Stat. 44 and 45 Vict. c. 41, § 65. *Ante*, p. 217.
[4] Ibid. § 65 (3). [5] *Ante*, p. 168 et seq.
[6] Bankruptcy Acts, 1849, 1861, 1869.
[7] Stats. 46 and 47 Vict. c. 52; 53 and 54 Vict. c. 71.
[8] Adjudication is proved by an office copy of the order, or by a copy of the *London Gazette* in which it is published.

commencement of the bankruptcy. The trustee is entitled to all the real estate of the bankrupt, except what is held by him in trust for another[1], and he may exercise any powers, in respect of property, that the bankrupt might have exercised for his own benefit[2], except the right of nomination to a vacant ecclesiastical benefice. And not only is the trustee entitled to all the realty belonging to the bankrupt at the commencement of his bankruptcy, but various alienations of the bankrupt's property, made before bankruptcy, may be set aside in favour of the trustee. Thus any transfer of or charge on property in favour of a creditor made with a view of giving him a preference over other creditors is void if the debtor becomes bankrupt within three months afterwards. Further it is provided that any settlement, not made before and in consideration of marriage, nor in favour of a purchaser in good faith and for valuable consideration[3], shall be void as against the trustee in bankruptcy if the settlor becomes bankrupt within two years after the settlement; and if the settlor becomes bankrupt within ten years after the settlement it will be equally void, unless the parties claiming under the settlement can prove that, at the time of settlement, the settlor was able to pay all his debts without the aid of the settled property, and that his interest in that property really passed to the trustee of the settlement at the time of execution. However a purchaser for value from a beneficiary under the settlement has a good title against the trustee in bankruptcy[4]. The act also provides that any contract in consideration of marriage for the future settlement, on the wife or children of the contractor, of property in which he had no interest at the time of

[1] This remains vested in the bankrupt. See 46 and 47 Vict. c. 52, § 44.

[2] If the power cannot be exercised for the bankrupt's own benefit it remains vested in him.

[3] A settlement on or for the wife or children of the settler will not be set aside if it deals with property that has accrued to the husband after his marriage in right of his wife.

[4] And this whether he has notice of the settlement or not.

marriage shall be void as against the trustee in bankruptcy if the contractor becomes bankrupt before the property is transferred under the contract.

The trustee is given wide powers over all the property that vests in him. He may sell or transfer all or any part of it; he has the same powers as the bankrupt had in dealing with the bankrupt's estates tail; and what he cannot advantageously sell he may divide among the creditors. Further than this, he may disclaim onerous property, and if the disclaimer be made in writing, signed by the trustee and under the conditions of the act[1], it determines the rights and liabilities of the bankrupt in respect of the property disclaimed[2].

A bankrupt may be discharged by order of the Court[3], and he is entitled to any property acquired by or devolving on him after the discharge.

Infants. Before leaving the subject of conveyances inter vivos something must be said as to the modifications due to status. A conveyance by an infant[4] as owner is voidable at his option, and an infant purchaser can repudiate the contract[5]. However, by the Infant Settlements Act, 1855, a male infant not under twenty or a female infant not under seventeen is allowed, with the permission of the Chancery Division of the High Court of Justice, to make a valid settlement of property; but if, in virtue of this act, an infant tenant in tail makes an appointment or a disentailing assurance it will be void in case the infant dies under age. Since infants were not, as a rule[6], permitted to alienate their property, it was customary in settlements made for the benefit of infants to appoint trustees to manage and, if advisable, dispose of the property. Various powers for these purposes have been

[1] Stats. 46 and 47 Vict. c. 52, § 55 (1), (4); 53 and 54 Vict. c. 71, § 13.

[2] Ibid. § 55 (2).

[3] The discharge is proved by an office copy of the order of discharge.

[4] Age is proved by a certificate of birth under the seal of the General Register Office or by a certificate of baptism.

[5] See Infant's Relief Act, 1874 (37 and 38 Vict. c. 62, § 2).

[6] The custom of gavelkind was the chief exception.

conferred on guardians and trustees by modern statutes. Thus it was enacted that the guardian[1] of an infant could act on his behalf for the purposes of the Settled Estates Act, 1877[2], and by the Conveyancing and Law of Property Act, 1881[3],

"where a person in his own right seised of or entitled to land for an estate in fee simple is an infant, the land shall be deemed to be settled estate within the Settled Estates Act, 1877."

The restriction in this clause to estates in fee simple was removed[4], and the provisions of former acts extended, by the Settled Land Act, 1882[5]. This enables the trustees of the settlement, or, if there are none, persons appointed by the Court, to exercise the powers of tenant for life under the act, in case the tenant for life is an infant[6].

Lunatic.

A conveyance by a lunatic can be avoided by the lunatic's representative or by the person himself on his return to sanity, provided the alienee knew of the insanity[7]; but if a purchaser for valuable consideration had no notice of the insanity the conveyance is valid[8]. Similarly with a contract for purchase entered into by a lunatic. Power to sell, exchange or partition a lunatic's property, and to exercise any power vested in the lunatic for his benefit, are given by the Lunacy Act, 1890[9], to the committee of the estate of a lunatic so found by inquisition, and in case of a lunatic not so found to such person as the Judge in Lunacy may appoint. The com-

[1] The mother is now a guardian under the Guardianship of Infants Act, 1886 [49 and 50 Vict. c. 27].

[2] Stat. 40 and 41 Vict. c. 18, § 49.

[3] Stat. 44 and 45 Vict. c. 41, § 41.

[4] The only restriction is that the person must be "entitled in possession," and copyholds as well as freeholds are included. However, the infant must not be contingently entitled.

[5] Stat. 45 and 46 Vict. c. 38, §§ 59 and 60. *Ante*, p. 221.

[6] The disability of infancy remains, notwithstanding coverture.

[7] This was not always the case. See *ante*, p. 152, note 1.

[8] See *Price v. Berrington*, 3 Mac. and G. 486.

[9] This consolidates the principal acts dealing with lunatics.

mittee of a lunatic may also act for him for the purposes of the Settled Estates Act, 1877[1], and of the Partition Acts, 1868 and 1876[2], and of the Settled Land Acts, 1882 to 1890[3]; and by leave of the judge it may take proceedings to have the lunatic made a bankrupt[4].

Corporations.

We have seen that in the earlier days the capacity of a corporation to hold land was seriously restricted by the law as to alienation in mortmain. As a corporation could not die like an ordinary person, the lord lost the possibility of regaining his land by escheat, and it was mainly for this reason that the various restraints on alienations in mortmain were imposed from the time of the statute De Religiosis[5] onwards. The modern law on the subject is contained in the Mortmain and Charitable Uses Act, 1888[6], by virtue of which the conveyance of any realty to a corporation, unless under special licence from the Crown or special statutory power, is a cause of forfeiture to the Crown. However, the Municipal Corporations Act, 1882[7], empowers a municipal corporation to purchase land, not exceeding five acres, for certain specific purposes[8], and even when the corporation has not power to acquire land a purchase may be effected with the consent of the Treasury[9]. The same act empowers the corporation, with the approval of the Treasury, to dispose of its land[10], the advowsons attached thereto being sold as the Ecclesiastical Commissioners direct[11]. Under the Universities and College Estates Act, 1858[12], amended by the Universities and College Estates Act Extension, 1860[13], restricted powers of disposition of lands are given to the Universities and Colleges of Oxford, Cambridge, and Durham, and the colleges of Eton and Westminster, and the profits of any such disposition are to be expended in the purchase of

[1] 40 and 41 Vict. c. 18, § 49.
[2] 39 and 40 Vict. c. 17, § 6.
[3] 45 and 46 Vict. c. 38, § 62.
[4] 46 and 47 Vict. c. 52, § 148.
[5] *Ante*, p. 107.
[6] 51 and 52 Vict. c. 42.
[7] 45 and 46 Vict. c. 50.
[8] Ibid. § 105.
[9] Ibid. § 107.
[10] Ibid. § 109.
[11] Ibid. § 122 (1).
[12] 21 and 22 Vict. c. 44.
[13] 23 and 24 Vict. c. 59.

other lands for the corporations. The Act 14 and 15 Vict. c. 104 gave similar powers to ecclesiastical corporations acting with the approval, in writing, of the Church Estates Commissioners[1]. The realty belonging to a parish is vested in the churchwardens and overseers of the poor, and these were empowered[2] to purchase land to the extent of fifty acres for the employment of the poor; but this power was afterwards[3] transferred to the guardians of the poor, or if there are no guardians to the overseers acting under the control of the Local Government Board.

Public companies incorporated by special Acts of Parliament are usually empowered thereby to purchase lands for the purposes of their business without special licence from the Crown, and this provision applies to joint stock companies registered under the Companies Act, 1862[4]. The power is, however, limited to trading companies that have no tendency to withdraw the land from the possibility of alienation, and the act provides that a company formed for the promotion of science, art, charity, religion, or the like may not hold more than two acres unless with special licence from the Board of Trade[5].

The Crown.

It has been seen[6] that a long series of Acts of Parliament has taken from the Crown the powers of disposing of its land, and vested them, with various restrictions, in commissioners. An act of Victoria's reign[7] declares that none of the restraints on alienation imposed on the Sovereign by the earlier acts are to extend to the *private* estates of the Sovereign. These private estates may be disposed of by the Sovereign in the manner provided by § 4 of 39 & 40 Geo. III. c. 88; but a will concerning such estates does not require publication, and it is valid and effectual if signed by the testator or

[1] § 6.

[2] By Stat. 59 Geo. III. c. 12, § 12; altered by Stat. 1 and 2 Will. IV. c. 42.

[3] By Stat. 5 and 6 Will. IV. c. 69.

[4] 25 and 26 Vict. c. 89, § 18.

[5] Ibid. § 33.

[6] *Ante*, p. 156.

[7] 25 and 26 Vict. c. 37, § 2.

testatrix, or by some other person in his or her presence, and by his or her direction, in the presence of two witnesses. On the demise of the Sovereign the private estates descend according to § 5 of 39 & 40 Geo. III. c. 88[1].

Married Women.

We have seen that at common law a married woman was incapable of entering into any contract except as the agent of another person, and that, until the Fines and Recoveries Act, 1833, the only way in which she could convey a freehold, not settled to her separate use, was by a fine. The Act of 1833, as amended by the Conveyancing Act of 1882[2], enables a married woman to dispose of her freehold as if she were a *feme sole*; but the disposition must be made by a deed in which her husband concurs. This deed must be acknowledged by the married woman after she has been examined, apart from her husband, as to her knowledge of its contents and her assent to the disposition. The acknowledgment must be made before a judge of a superior or county court, or a master in Chancery, or a commissioner appointed for the purpose, and a memorandum of the acknowledgment must be indorsed on the deed[3]. These formalities were also necessary in the case of a married woman, tenant in tail, executing a deed to bar the entail[4], and also in the conveyance of future or contingent interests[5]. The changes introduced by the Married Women's Property Act, 1870[6], affected the wife's equitable and not her legal interests, and so will come more appropriately under the head of Equity, and they have been rendered insignificant by the Married Women's Property Act of 1882[7] which came into operation on the 1st of January,

[1] 25 and 26 Vict. c. 37, §§ 5, 7. [2] 45 and 46 Vict. c. 39, § 7.

[3] An indorsed memorandum of acknowledgment is not sufficient evidence of the acknowledgment. See *Jolly v. Handcock*, 7 Ex. 820.

[4] 3 and 4 Will. IV. c. 74, § 40. *Ante*, p. 197. But see *infra*, M. W. P. A. 1882, p. 245, note 2.

[5] 8 and 9 Vict. c. 106, § 6. *Ante*, p. 207.

[6] 33 and 34 Vict. c. 93, repealed as from the 1st of Jan. 1883, without prejudice to any right acquired while it was in force.

[7] 45 and 46 Vict. c. 75. *Ante*, p. 221.

1883. This is an epoch in the history of married women's property, for by the act every woman married after 1882, and, as far as regards property acquired after 1882, every woman married before 1883, is given the power of acquiring, holding and disposing of any real property just as if she were a *feme sole*[1]. No trustee is necessary, and the concurrence of the husband in any disposition is not required[2]. Of course she may still be deprived of this power of disposition by a restraint on anticipation. Such a restraint frequently gives rise to difficulties when a married woman wishes to acquire property, but notwithstanding the restraint

"the Court may, if it thinks fit, where it appears to the Court to be for her benefit, by judgment or order, with her consent, bind her interest in any property[3]."

Formerly a husband and wife were regarded for some purposes as one person, and so could not convey lands to one another directly; but this rule has now been abandoned[4]. Further than this, on a gift of lands to husband and wife they took by entireties, and not as joint tenants; but, after the Act of 1882, they take like two unmarried persons[5]. The change has not, however, been carried out quite consistently, for husband and wife still take only as one person if there is a gift to them and others in joint tenancy or tenancy in common, unless a contrary intention is clearly expressed[6]. Under the Settled Land Act, 1882[7], where a married woman tenant for life is entitled for her separate use, or under any statute for her separate property, or as a *feme sole*, then

[1] Except where she is a trustee [other than a bare trustee; see Trustee Act, 1893, § 16], in which case an acknowledgment of the deed is still necessary.

[2] e.g. in a case to which the act applies she may bar an estate tail without acknowledgment of the deed. See *Re Drummond and Davies' Contract*, 1891, 1 Ch. 524.

[3] Conveyancing Act, 1881, § 39.

[4] Ibid. § 50.

[5] *Re March*, 27 Ch. D. 166; *Thornley v. Thornley*, 1893, 2 Ch. 229.

[6] *Re Jupp*, 39 Ch. D. 148, and *Re March*, 27 Ch. D. 166.

[7] Stat. 45 and 46 Vict. c. 38, § 61.

she can exercise the powers of a tenant for life under the act without her husband; but when she is otherwise entitled then the husband and wife together have the powers of a tenant for life[1]. A restraint on anticipation does not prevent a married woman from exercising her power, and she does not require the concurrence of her husband in the execution of instruments[2]. After the Married Women's Property Act, 1882, the only case[3] in which the concurrence of the husband is required is where the wife is not entitled for her separate use and both marriage and settlement are prior to 1883.

Felons. It has been observed that, from very early times, a person attainted of high treason forfeited his lands to the Crown, whether the lands were held in fee simple or fee tail. In cases of petit treason or murder, and, until 54 Geo. III. c. 145, in all cases of felony, the lands escheated on attainder of the tenant to the lord of the fee if held in fee simple, but if held in fee tail they devolved on the issue in tail. After the act just mentioned there were a number of felonies in which no attainder took place, but, except in these cases, a convict could not alienate realty previously vested in him so as to defeat the rights of the Crown or lord. The law was changed by the Forfeiture Act of 1870[4], forfeiture to the Crown or lord was abolished, but convicts were still made incapable of alienating in any other manner than that prescribed by the act. Provision was made for the appointment of an administrator in whom all the convict's property vests and who has absolute power to deal with the property as he thinks fit[5]. The property is preserved for the convict[6] and reverts to him or to his representatives when he completes his sentence, is pardoned, or dies.

Aliens. The powers of aliens to acquire and dispose of realty

[1] Stat. 45 and 46 Vict. c. 38, § 61 (2), (3). [2] Ibid. § 61 (5), (6).
[3] But see *post*, p. 268, *re* trustee. [4] 33 and 34 Vict. c. 23.
[5] §§ 9, 12. The act, however, does not affect property acquired by the convict while lawfully at large under a licence.
[6] Except he has been outlawed.

have been entirely altered by the Naturalization Act, 1870[1], which places them on the same footing as natural-born British subjects. The act, however, is not retrospective[2], so that a knowledge of the earlier law is still occasionally required. At common law aliens were allowed to purchase real estate, but they could not hold it securely as the Crown might at any time claim the property[3]. And this insecurity was transmitted to anyone who acquired the property from the alien, as the conveyance did not affect the right of the Crown to re-enter. However the rule was somewhat modified by Stat. 32 Hen. VIII., c. 16, § 13, which allowed friendly alien merchants to acquire and hold houses for their own habitation.

Disability due to statute or public policy.

We have been considering disabilities due to status. In addition to this it should be noted that there are a few cases in which special disabilities are imposed by statute. Thus the General Inclosure Act[4] forbids the commissioners acting under this statute to purchase any land, in respect of which an inclosure is made, within five years of the inclosure, and a similar disability is imposed on the valuers under the Commons Inclosure Act[5]. In some cases, although there is no special act, a disability arises from considerations of public policy. Thus a bishop may not purchase an annuity upon a rectory, as his consent is necessary to the charge of the annuity, and similarly an arbitrator may not purchase the claims of the parties to the arbitration until he has settled those claims.

Wills.

Turning now from alienation inter vivos to alienation by will, it should be noted that modern wills (made since 31st Dec. 1837) are governed by the Wills Act, 1837[6], the

[1] 33 Vict. c. 14, amended by 33 and 34 Vict. c. 102; 35 and 36 Vict. c. 39; 58 and 59 Vict. c. 43.

[2] See *Sharp v. St Sauveur*, L. R. 7 Ch. 343.

[3] Coke, Littleton 2 *b*.

[4] 41 Geo. III. c. 100.

[5] 8 and 9 Vict. c. 118, § 120. The term is seven years in this case.

[6] Stat. 1 Vict. c. 26.

most important sections of which have been considered in the last chapter[1]. From what was there said it will be seen that although every instrument purporting to be a will is not so regarded by the Courts, yet no special form is necessary to the validity of the document, and, if the provisions of the Wills Act are complied with, anything that is intended not to take effect until the maker's death is construed as a will, even although in form it is a disposition inter vivos. The act makes it

"lawful for every person to devise by his will, executed in proper manner, all real estate to which he shall be entitled, either at law or in equity, at the time of his death, and which, if not so devised, bequeathed, or disposed of, would descend upon the heir at law or customary heir[2]."

Restraints on alienation.

However, in spite of this very wide power of disposition, it should be noted that there are some devises that the law refuses to carry out from considerations of public policy. Thus gifts to superstitious and charitable uses are discouraged, the earlier law as to alienation of lands for charitable purposes being repealed and replaced by the Mortmain and Charitable Uses Act, 1888[3]. Every assurance of realty, coming within the operation of the statute, must be made strictly in accordance with the provisions of the act, and a will was altogether prohibited. This rigid rule was amended by an act of 1891[4] which permitted an assurance of land for charitable purposes by will, but provided that the land must, as a rule, be sold within a year for the benefit of the testator[5]. Besides these restrictions on alienation for charitable purposes, a devise must not contain conditions contrary to the rule

[1] *Ante*, p. 203 et seq.

[2] 1 Vict. c. 26, § 3; but as to trust estates (not being copyhold or customary tenure) see *post*, p. 263. As to whether a quasi tenant in tail can devise without some other act to bar the entail, there is a conflict of authorities. See *Doe v. Luxton*, 6 T. R. 293; *Campbell v. Sandys*, 1 Sch. and L. 274.

[3] Stat. 51 and 52 Vict. c. 42. [4] Stat. 54 and 55 Vict. c. 73.

[5] The restrictions have been relaxed in favour of various charitable institutions. See *ante*, p. 242, *sub tit.* Corporations.

against perpetuities or that against accumulation[1], nor a condition imposing an unqualified restriction on marriage[2].

Ambiguities and indefinite gifts in wills.

Not uncommonly a devise fails through uncertainty as to the subject or object, and this defect cannot be remedied by extrinsic evidence as to what was meant. In all cases, however, the Courts are anxious to carry out the intention of the testator, and in their efforts to do this they will admit parol evidence to clear up difficulties arising from the use of vague or inconsistent terms, wherever there is a clear intention to dispose of the property. Before the Wills Act, 1837, a devise in general terms did not convey more than an estate for life, if the proper terms to create a larger estate were not employed; but this narrow rule of construction was set aside by that act[3]. Generally speaking, a gift to several persons simply makes them joint tenants; but in a will a slight indication of an intention to create a tenancy in common suffices to do so.

Estates arising by implication.

In some cases an estate is created by a will although not explicitly mentioned at all. This occurs when the devise is such that there is a strong probability that the testator intended to create the estate[4]. Thus an estate for life is often implied from a future devise to the heir-at-law, e.g. if *A*, an owner in fee simple, devises the estate to *B*, his heir-at-law, after the death of *C* and there is no residuary devise, then *C* takes a life estate by implication, for *A* would not have devised the estate to *B* in the future unless he meant someone else to hold it in the meantime. However a devise to *B* and *others*, to take effect after the death of *C*, would raise no implication that *C* should take a life estate. Under the earlier law, if *A* devised realty to *B* in fee in case *C* (*A*'s heir-apparent) should die without

[1] Stat. 39 and 40 Geo. III. c. 98 (the Accumulations Act, 1800, commonly called the Thellusson Act), also Stat. 55 and 56 Vict. c. 58.

[2] See *Jones v. Jones*, 1 Q. B. D. 279. There is no objection to such restraint in case the devisee is a widow or widower. See *Newton v. Marsden*, 2 J. H. 356, and *Allen v. Jackson*, 1 Ch. D. 399.

[3] § 28, *ante*, p. 205.

[4] See Lord Eldon, 1 Ves. and B. 466, and *Gardner v. Sheldon* in Tudor's L. C. 625.

issue, then the heir-apparent took an estate tail by implication[1]; the words "die without issue" being construed to mean failure of issue at death or any time afterwards. This rule of construction was altered by the Wills Act[2], after which, where the prior devisee would formerly have been tenant in tail with remainder over, he took an estate in fee simple subject to an executory devise in the event of his dying without leaving issue at his death. If lands are devised to several persons as tenants in common in tail, and, upon failure of their issue, to another person *A*, and if it is intended that all the lands should pass together to *A* but not until the failure of issue of all the tenants in tail, then cross remainders are implied as between these tenants, so that each takes a vested remainder in tail, expectant on the other's estate.

Disabilities.

As to the effect of status on the validity of a will something was said in the preceding period[3]; but important changes have been effected since that time. Under the old law the will of an infant was generally void, but infants might devise by special custom. Now, by the Wills Act, 1837[4], no will made by an infant is valid. Before 1882 a married woman had, generally speaking, no power to make a will, but now she can dispose of property coming under the operation of the Married Women's Property Act, 1882[5], as if she were a *feme sole*. It was held, however, that the operation of the first section of this act must be confined to property acquired during the coverture[6], and so that the will of a *feme covert* must be made or republished during widowhood in order to dispose of property acquired after the determination of the coverture[7]. This was altered by the Married Women's Property Act, 1893[8], which enacted that

[1] If however *C* were a stranger the case was different, for then the devise over was not to the heir, and it was void as an executory devise taking effect after an indefinite failure of issue.

[2] § 29, *ante*, p. 205. [3] *Ante*, p. 166. [4] § 7, *ante*, p. 204.

[5] *Ante*, p. 221. [6] *Re Price*, 28 Ch. D. 709.

[7] See *Willock v. Noble* [L. R. 7 H. L. 580].

[8] 56 and 57 Vict. c. 63, § 3.

"§ 24 of the Wills Act, 1837, shall apply to the will of a married woman made during coverture, whether she is or is not possessed of or entitled to any separate property at the time of making it, and such will shall not require to be re-executed or republished after the death of her husband[1]."

At common law the devise of lands by an alien was voidable, as the Crown might seize the lands; but this incapacity was removed by the Naturalization Act, 1870[2], which also made aliens capable of acquiring realty in the same way as a natural-born British subject. Lastly, it should be noted that the disabilities of felons were removed by the Forfeiture Act, 1870[3].

Revocation of a will.

It is not unquestionable that a testament, properly made by a person under no disability, will be accepted as satisfactory evidence of title, for it may have been revoked. A will is revoked by marriage, except when made in exercise of a power of appointment[4]. It may also be revoked by burning, cancelling, tearing, or obliterating, provided this is done with intent to revoke the will, a matter to be proved by evidence. A subsequent will or codicil may revoke the earlier one, and revocation is also effected by alienating or altering the estate[5]. Formerly, too, a conveyance even if void nullified the devise of the estate, provided the invalidity in the conveyance arose merely from the incapacity of the grantee or the want of some ceremony; but this has been altered by the Wills Act.

Evidence of title by will.

As to evidence of title, it should be remarked that the original will itself is the proper evidence. However the Court of Probate Act, 1857[6], makes the probate after proof

[1] This section applies to wills, whenever executed, of women dying after the date of the act. *Re Wylie* [1895], 2 Ch. 116.

[2] Stat. 33 Vict. c. 14. It should be observed that the act was *not* retrospective.

[3] Stat. 33 and 34 Vict. c. 23.

[4] Wills Act, § 18, *ante*, p. 204, and this revocation cannot be prevented by any declaration to the contrary.

[5] The revocation applies only to the part of the will dealing with the estate subsequently alienated or altered. See Wills Act.

[6] Stat. 20 and 21 Vict. c. 77, §§ 62, 64.

in solemn form conclusive evidence as against persons cited to attend the proof; and if the validity of the will is not in question the act also allows the probate, or an office copy, of the will to be given in evidence.

Devolution of a devise.

It has been seen that the drift of modern legislation is to assimilate the devolution of realty to that of personalty. An important movement in this direction was made by the Land Transfer Act, 1897[1]. Before Jan. 1st, 1898, on the death of the testator the land passed at once to the devisee. Now, however, it devolves first on his personal representatives as if it were a chattel real[2]. The personal representatives hold the realty as trustees for the devisee[3], but the latter is not entitled until the assent of all the personal representatives has been obtained[4]. No special form of assent is prescribed except in the case of registered land[5]. If, however, the personal representatives fail to convey within a year of the death of the testator, application may be made to the Court to carry out the conveyance[6].

Descent.

Inheritance remains, as before, one of the most common of titles. Some important changes in the rules of descent were made by the Inheritance Act, 1833[7], and the devolution of an estate vested in a person solely as trustee or mortgagee has been several times altered within the present period[8]. A change was introduced, too, by the Intestates' Estates Act, 1890[9], which gives the widow a

[1] Stat. 60 and 61 Vict. c. 65, *ante*, p. 222.

[2] Ibid. § 1. Until administration is taken out the legal estate remains in the heir. See *John v. John* [1898], 2 Ch. 573.

[3] Ibid. § 2 (1). [4] Ibid. § 2 (2) and § 3 (1).

[5] Ibid. § 3 (4) and § 6 (5), and see also Land Transfer Rules, r. 130, form 46.

[6] Ibid. § 3 (2); § 4 also provides for the appropriation of part of the residuary estate in satisfaction of a legacy or share in the residuary estate with consent of the person entitled; but before such appropriation is effectual, notice must be given to all persons interested in the residuary estate, and this notice is part of the title to the appropriated land.

[7] Stat. 3 and 4 Will. IV. c. 106, *ante*, p. 202. [8] See *post*, p. 264.

[9] 53 and 54 Vict. c. 29. The act does not apply to the case of partial intestacy. See *Re Twigg, Twigg v. Black* [1892], 1 Ch. 579.

title to £500 worth of the estate (or the whole estate if its value does not exceed that amount) in case the husband dies intestate and without issue. Lastly, it must be noticed that all that has just been said under the head of Wills with reference to the devolution of an estate under the Land Transfer Act, 1897, applies equally to the case of succession on intestacy. The heir does not succeed at once, as the property must first pass to the executor or administrator, whose assent to the conveyance is necessary to complete the transfer.

Dower.

The law as to dower, after remaining for centuries very much as Littleton described it[1], was almost entirely changed at the outset of the present period by the Dower Act, 1833[2]. The main provisions of that act were discussed in the last chapter and little further comment is necessary. It may be added that, before the Dower Act, a question often arose as to whether a widow was put to her election between her dower and a benefit conferred by her husband's will. After the act, however, the widow can have no right in a freehold that cannot be defeated by the husband's will. A dissolution of marriage under the Divorce Act[3] also destroys any right to dower. When the Dower Act was discussed in the last chapter it was pointed out that dower has lost most of its importance by being placed completely in the hands of the husband; but, of course, if the husband takes no steps to bar the dower the right of his widow remains. In such a case, if a conveyance is taken from the heir at law the concurrence of the widow to release her dower should be obtained, and this is usually done by inserting a clause in the deed of conveyance, thus :—

"And whereas the said [dowress] being satisfied with the provision made for her by the said [vendor] in lieu and satisfaction of her dower (as she hereby acknowledges), has

[1] *Ante*, p. 127.

[2] 3 and 4 Will. IV. c. 105, *ante*, p. 201. The act applies to gavelkind land [see *Farley v. Bonham*, 2 J. and H. 177], but not to copyhold.

[3] 20 and 21 Vict. c. 85.

agreed to join in these presents for the purposes and in manner hereinafter appearing.....: To Hold all the premises unto and to the use of the said [purchaser], his heirs and assigns, Freed and discharged from all dower of the said [dowress] and all rights, claims and demands in respect thereof."

Curtesy.

Dower having been struck at in 1833, Curtesy received an almost equally severe blow by the Married Women's Property Act, 1882. Before that act the sphere of operation of the rules as to curtesy had been somewhat extended, rather than diminished, since our last reference to the subject. In order that the husband could be entitled the wife must, as a rule, have obtained actual seisin, but if the circumstances were such that this was impossible, then a seisin *in law* sufficed. This doctrine of seisin in law was extended[1] to the case of a wife to whom lands had been devised by her father and who had died before the father, her existence being artificially continued, by § 33 of the Wills Act, so as to prevent a lapse.

The Married Women's Property Act, 1882[2], contains no explicit reference to curtesy, but it places the whole matter in the hands of the wife by enabling her to dispose of her property "as if she were a *feme sole*, without the intervention of any trustee[3]." She is now a separate person, and the husband takes nothing during the coverture. It is only when the wife dies intestate that the husband gets the estate by the curtesy in cases where he would have done so before the act. Thus the old curtesy has practically disappeared, and the husband has no present freehold in right of his wife, nor can he have any remainder, as there is no particular estate to support it. Dower and curtesy are now under control, the former of the husband, the latter of the wife, and both are practically merely rights of succession on intestacy. As with dower, however, if no steps are taken to prevent the right accruing the old rules maintain, and a purchaser

[1] See *Eager v. Furnivall*, 17 Ch. D. 115.

[2] 45 and 46 Vict. c. 75, *ante*, p. 221.

[3] Ibid. § 1.

is subject to the interest of the tenant by the curtesy unless the latter concurs in the conveyance.

Prescription.

In the last chapter we began the survey of modern legislation by an account of the Prescription Act, 1832[1], and, after what was there said, little need be added here. As was pointed out before, the act is of importance in the history of the subject, in that it sets up a new species of prescription. At the same time it is merely supplementary to the earlier law considered in previous periods, and that earlier law is applied to all cases that do not come within the provisions of the Act of 1832[2].

Limitation of Actions.

Analogous to the operation of Prescription is the action of Statutes of Limitation, by means of which interests in realty are lost by a person otherwise entitled against one in possession for a sufficient length of time. In early times, as has been seen, no definite period of years was fixed, but the limit was set at some notable time, the beginning of the reign of a king. This principle was abandoned in favour of a fixed interval of years in the reign of Hen. VIII.[3], and the law on the subject was further modified by statute in the time of James I.[4] On this statutory basis the law remained until the present period, but it was very confused and unsatisfactory. The period of limitation was different for different actions as well as for different rights, and a complicated doctrine of adverse possession involved the subject in almost hopeless confusion[5]. This doctrine of adverse possession in the old sense was abolished, and the whole law on the subject of limitations remodelled and greatly simplified, by the Statute of Limitations, 1833[6]. A more recent act[7] has shortened the periods of limitation, but has not otherwise seriously affected the earlier law. It should be noted that

[1] Stat. 2 and 3 Will. IV. c. 71. *Ante*, p. 190.

[2] See *Aynsley v. Glover*, L. R. 10 Ch. 283.

[3] Stat. 32 Hen. VIII. c. 2. [4] 21 Jac. I. c. 16.

[5] Even Lord Mansfield remarked, "The more we read the more we shall be confounded." See *Taylor d. Atkyns v. Horde*, 2 Smith's L. C.

[6] 3 and 4 Will. c. 27, *ante*, p. 192.

[7] 37 and 38 Vict. c. 57, *ante*, p. 208.

these enactments do not extend to the Crown[1]; but a period of limitation of sixty years has been fixed for various Crown rights[2].

Copyholds. Several changes have been introduced in the methods of alienating copyholds[3], although the main body of the law remains as before. Surrender and admittance is still the usual method, and custom[4] is supreme in regulating the form and language used in the conveyance. A sur-

Surrender. render is evidenced by a copy of the Court roll signed by the steward. Formerly, if the surrender were made out of Court it was necessary that it should be presented by the copyholders in attendance at the next Court, but the necessity for this presentment was abolished by Stat. 4 & 5 Vict. c. 35, § 89[5], which makes an entry of the surrender on the Court rolls suffice. Such an entry usually runs somewhat as follows:—

"Manor of ——
in the
County of ——

Be it remembered that on the — day of &c. *A-B* [vendor] of &c., one of the copyhold tenants of the said manor, came before *C-D*, gentleman, steward of the said manor, and in consideration of the sum of £— to the said *A-B* then paid by *E-F* [purchaser] of, &c., did out of Court surrender into the hands of the lord of the said manor by the hands and acceptance of the said steward by the rod, according to the custom of the said manor, All That [here is inserted a description of the lands from the copy of the Court rolls][6], with the appurtenances, To The Use of the said *E-F* his heirs and assigns, for ever, To Hold by Copy of Court Roll, at the will of the lord, according to the custom of the said manor,

[1] Cf. p. 174, note 1.

[2] Stats. 9 Geo. III. c. 16; 23 and 24 Vict. c. 53; 24 and 25 Vict. c. 62.

[3] Customary freeholds are subject to rules very similar to those dealing with copyholds.

[4] Custom is proved by the steward's certificate.

[5] Replaced by the Copyhold Act, 1894, Stat. 57 and 58 Vict. c. 46, § 85.

[6] The lord can refuse to accept a surrender if the parcels are not described as on the Court rolls.

and at by and under the rents and services therefor due and of right accustomed."

And to a certified copy is added,

"This surrender was taken and accepted } the day and year above written }

By me, *J-K*, steward of the said manor."

Unless there be a custom to the contrary, the surrender may be made by attorney. Once the surrender has been made the vendor is a trustee for the surrenderee[1], whose title, after admittance, relates back to the date of the surrender.

Admittance must be in accordance with the terms of the surrender. When made immediately after the surrender the record of it proceeds thus:— Admittance.

"Whereupon to the Court comes in his proper person the said *E-F* and prays to be admitted tenant to the tenements and premises hereinbefore described, to whom the said lord of the manor by the steward thereof grants seisin thereof by the rod according to the custom of this manor: To Hold to him, his heirs and assigns, at the will of the lord, according to the custom of the said manor, by the rents and services therefor due and of right accustomed, and he pays — to a fine, and his fealty is respited, and he is admitted tenant."

If the admittance is not made immediately after surrender then the record of the admittance must contain recitals showing when and at what Court the surrender was made, etc. Admittance may be by attorney[2], and, whereas formerly it must take place in the customary Court, it may now be effected anywhere[3]. Unless there is a custom to the contrary the admittance of a particular tenant suffices for all remaindermen, so also one of several joint tenants for all; but tenants in common must be admitted separately.

[1] The surrenderee may alienate his equitable right inter vivos, or allow it to descend to his heir, or devise it by will. See Wills Act, 1837, Stat. 1 Vict. c. 26, §§ 3, 4, 5.

[2] Copyhold Act, 1887, Stat. 50 and 51 Vict. c. 73, § 2.

[3] Copyhold Act, 1841, replaced by Stat. 57 and 58 Vict. c. 46 (Copyhold Act, 1894).

Special provision has been made by statute for admitting an infant either in person or by attorney or guardian[1], and of a lunatic by his committee or by attorney appointed by the lord of the manor[2].

A married woman may also be admitted[3], and under the Married Women's Property Act, 1882, she may dispose of copyholds which are her separate property under that act as if she were a *feme sole*. Corporations aggregate cannot be copyholders[4], but there is not the same disability with corporations sole. As copyholds are within the Mortmain Act (9 Geo. II. c. 36) the provisions of that act must be complied with for a valid conveyance to charitable uses.

In case of a grant of a copyhold by the lord, a memorandum of the grant is entered on the Court rolls as in the case of an ordinary admittance[5]. If the lord be an infant, his guardian, or, if he have no guardian, a person appointed by the Board of Agriculture, may act on his behalf[6], and if a lunatic, his committee may do so[7]. By the Copyhold Act, 1894, a married woman, lady of a manor, is for the purposes of that act to be deemed a *feme sole*.

Other modes of conveyance inter vivos.

It was noticed in earlier periods that custom ruled the copyholder, and that it was not possible to depart from the customary modes of conveyance, any attempt to do so being a cause of forfeiture to the lord of the manor. In some cases, however, the legislature has interfered, and introduced new methods of dealing with copyholds. (*a*) Thus the Fines and Recoveries Act, 1833[8], enabled an

[1] Stats. 11 Geo. IV. and 1 Will. IV. c. 65, §§ 3—8.

[2] Lunacy Act, 1890, Stat. 53 and 54 Vict. c. 5, § 125.

[3] Stat. 11 Geo. IV. and 1 Will. IV. c. 65, §§ 3—5.

[4] But they may have an equitable estate in copyholds.

[5] By the Copyhold Act, 1887 (50 and 51 Vict. c. 73, § 6) the consent of the Lands Commissioners is necessary before a new grant of lands, not previously of copyhold tenure, may be held by copy of Court roll.

[6] Copyhold Act, 1894, Stat. 57 and 58 Vict. c. 46, § 45.

[7] Lunacy Act, 1890, Stat. 53 and 54 Vict. c. 5.

[8] § 50, *ante*, p. 198.

estate tail to be barred by surrender even although the custom of the manor might have presented some other mode. If the property is held under a settlement the consent of the protector is required and must be evidenced by deed, and this deed must be produced to the lord of the manor (or his steward or deputy steward), endorsed by him, and then entered on the Court rolls[1]. (*b*) The Real Property Act, 1845[2], enables

"a contingent, an executory and a future interest and a possibility coupled with an interest in any tenements or hereditaments of any tenure"

to be disposed of by deed. (*c*) Copyholds are included in the Settled Lands Act, 1882, and, by § 20 of that act, the tenant for life is empowered to convey by deed entered on the Court rolls, and, when this has been done and the customary fines paid,

"any person whose title under the deed requires to be perfected by admittance shall be admitted accordingly."

(*d*) When copyholds are purchased under compulsory powers they are conveyed by deed under the Land Clauses Consolidation Act, 1845[3]; but the deed must be entered by the steward on the Court rolls of the manor. (*e*) The Bankruptcy Act, 1883[4], gives the trustee in bankruptcy full power to dispose of the bankrupt's copyhold for the benefit of the creditors, and the trustee cannot be compelled to be admitted to the property,

"but may deal with it in the same manner as if it had been capable of being and had been duly surrendered or otherwise conveyed to such uses as the trustee may appoint; and any appointee of the trustee shall be admitted to or otherwise invested with the property accordingly[5]."

[1] The inrolment of the disentailing deed may be compelled by mandamus.

[2] *Ante*, p. 207. [3] Stat. 8 and 9 Vict. c. 18, § 95.

[4] Stat. 46 and 47 Vict. c. 52, § 56. [5] Ibid. § 50.

Such an appointment by the trustee is made by deed. In addition to these cases dealt with by statute there are others in which the ordinary conveyance by surrender and admittance is not employed. Thus a deed is often used when one of several co-owners wishes to convey his share to another, and on a sale of copyholds by executors under a power given by will, the conveyance is usually made by a bargain and sale at common law, and this gives the purchaser the right to admittance.

Curtesy and freebench.

The right to freebench was not affected by the Dower Act of 1833, and curtesy remains as before, except that the Married Women's Property Act, 1882, places it completely under the control of the wife, as she may alienate her property and so defeat the husband's expectations.

Wills.

The Wills Act, 1837[1], requires that wills of copyholds be executed and attested in the same manner as wills of freeholds, and the same act empowers a surrenderee or devisee to devise his interest although he has not been admitted[2]. Formerly it was customary for a devisee to bring the will into the Court and make a presentment of the decease of the testator and of the part of the will relating to the devise of the copyhold, after which he was admitted. Now, however, this presentment is unnecessary, all that is required being that a copy of the will be delivered to the lord or his steward or deputy steward, when it will be entered on the Court rolls and the devisee admitted[3].

Limitations.

The Statute of Limitations applies to copyholds as well as to freeholds[4].

[1] Stat. 7 Will. IV. 1 Vict. c. 26, §§ 2—5, 9. [2] Ibid. § 3.

[3] Copyhold Act, 1841, Stat. 4 and 5 Vict. c. 35, §§ 88—90; replaced by Copyhold Act, 1894, Stat. 57 and 58 Vict. c. 46, §§ 84, 85.

[4] See *Rex v. Lord of Manor of Agarsdley*, 5 Dowl. 19.

Equity.

Our task will be done when we have noted the principal changes since the last period within the domain of equity. In the first place it should be observed that the Judicature Acts[1] that came into force in 1875 abolished the old courts of equity and enacted that law and equity should be administered in the same court. The acts did not effect any important change in the substance of the law; but they altered the procedure, and as 'law' and equity are now on the same footing they should perhaps be discussed together and not apart. In the field of title to realty, however, equity is almost synonymous with the law of trusts, and there is still some convenience in dealing with this in a section by itself. As in earlier periods, a trust estate may be created by a conveyance inter vivos[2], or by will, or again by operation of law under the doctrines of implied and constructive trusts. The rules as to trusts created by construction of law have been altered in one respect by the Voluntary Conveyances Act, 1893[3]. According to the early law, a *voluntary* settlement by way of trust might be set aside, in virtue of 27 Eliz. c. 4, in favour of a subsequent purchaser for *value* even with notice of the settlement. Equity however stepped in and made the purchaser a trustee by a somewhat violent presumption of fraud; but the Act of 1893 declares that

Creation of estate of trustee.

"no voluntary conveyance of any lands, tenements or hereditaments, whether made before or after the passing of this Act, if in fact made *bonâ fide* and without any fraudulent intent, shall hereafter be deemed fraudulent or covinous within the meaning of the Act 27 Eliz. c. 4 by reason of

[1] Stats. 36 and 37 Vict. c. 66, § 16; 37 and 38 Vict. c. 83; 38 and 39 Vict. c. 77.

[2] A person intending to create a trust may now apply to the Court to appoint a suitable trustee. See Judicial Trustees Act, 1896 [59 and 60 Vict. c. 35].

[3] Stat. 56 and 57 Vict. c. 21.

any subsequent purchase for value, or be defeated under any of the provisions of the said Act by a conveyance made upon any such purchase, any rule of law notwithstanding."

It is an old rule that a trust estate shall never fail for want of a trustee, and the Trustee Act, 1893[1], which consolidated various enactments relating to trustees, provides[2] for the appointment of new trustees in various contingencies. The appointment must be made in writing[3] by some person that has power to appoint, or by order of the Court. As to the vesting of the trust property in new or continuing trustees it is enacted that

"where a deed by which a new trustee is appointed to perform any trust contains a declaration by the appointor to the effect that any estate or interest in any land subject to the trust shall vest in the persons who by virtue of the deed become and are the trustees for performing the trust, that declaration shall without any conveyance or assignment, operate to vest in those persons, as joint tenants, and for the purposes of the trust, that estate or interest[4]."

Nature of the estate.

As to the nature of the trust estate, the rule of construction that, in the absence of express limitations, gives to the trustee an estate sufficient, but not more than sufficient, for the execution of the trust is still in force, but it has been somewhat modified by §§ 30 & 31 of the Wills Act. In virtue of these sections

"where any real estate (not being a presentation to a church) shall be devised to any trustee or executor, such devise shall be construed to pass the fee simple, or other the whole estate or interest which the testator had power to dispose of by will

[1] Stat. 56 and 57 Vict. c. 53.

[2] Ibid. §§ 10, 25.

[3] This does not include a will. See *Re Parker's Trusts* [1894], 1 Ch. 707 and infra *re* will of trust estates.

[4] 56 and 57 Vict. c. 53, § 12 (1). It should be observed that, though the appointment of the trustee may be by writing only, the declaration vesting the legal interest is required to be by *deed*.

in such real estate, unless a definite term of years, absolute or determinable, or an estate of freehold shall thereby be given to him, expressly or by implication"; and "where any real estate shall be devised to a trustee without any express limitations of the estate to be taken by such trustee, and the beneficial interest in such real estate or in the surplus rents and profits thereof shall not be given to any person for life, or shall be given for life, but for the purposes of the trust may continue beyond the life of such person, such devise shall be construed to vest in such trustee the fee simple or other the whole legal estate which the testator had power to dispose of by will, and not an estate determinable when the purposes of the trust shall be satisfied."

Differences between trust estates and other legal estates.

As a general rule a trust estate has the same properties as an ordinary legal estate, but this rule has been considerably modified at various times during the present period. Thus long before the Forfeiture Act, trust estates were saved from forfeiture and escheat[1]; and the Bankruptcy Acts of 1869 and 1883[2] expressly declared that a trust estate should remain in the bankrupt and not vest in the assignee in bankruptcy. Also various acts made a difference between the devolution of a trust estate and that of an ordinary legal estate. The Vendor and Purchaser Act, 1874[3], made the estate of a *bare* trustee seised in fee simple devolve on his death like a chattel real upon his legal personal representative. This was repealed by the Land Transfer Act 1875[4], but re-enacted with an amendment confining its operation to a bare trustee dying *intestate*. This, in turn, was repealed by the Conveyancing Act 1881[5], which removed the distinction

[1] By Stat. 4 and 5 Will. IV. c. 23, replaced by 13 and 14 Vict. c. 60, §§ 15, 46, which give the Court of Chancery power to transfer the legal estate in case of failure of heirs of the trustee. However, this is rendered unnecessary by later enactments which make the estate descend like a chattel real to the personal representatives. See *infra*.

[2] Stats. 32 and 33 Vict. c. 71, and 46 and 47 Vict. c. 52.

[3] Stat. 37 and 38 Vict. c. 78, § 5, *ante*, p. 209.

[4] Stat. 38 and 39 Vict. c. 87, § 48, *ante*, p. 212.

[5] Stat. 44 and 45 Vict. c. 41, § 30, *ante*, p. 214.

between a bare trustee and any other trustee and made the trust estate[1] vest in the legal personal representative *irrespective of the will of the trustee.* Thus a will of a trust estate is now inoperative (except in the case of copyholds[2]), and where a trust or mortgage estate vests in the personal representatives of the trustee these representatives are "deemed in law his heirs and assigns within the meaning of all trusts and powers[3]." However the rules as to the devolution of a trust estate and an ordinary estate have again been assimilated by the Land Transfer Act, 1897, which makes an ordinary legal estate devolve like a chattel real[4].

Trustee's powers of disposition.

Subject to what has just been said as to a will of a trust estate, the trustee has very wide powers of disposition, for he may convey the estate by any of the methods inter vivos. However the doctrine of constructive trusts prevents him from effectually conveying to himself, or to his agent, except when he is simply the owner of a dry legal estate and not a trustee for sale. The special powers of a trustee in bankruptcy have already been considered[5], as also those of the tenant for life under the Settled Land Act, 1882[6], this tenant being

"in relation to the exercise of any power under the Act, deemed in the position and to have the duties and liabilities of a trustee for all parties entitled under the settlement[7]."

The equitable estate.

As to the properties and modes of disposition of an equitable estate, the analogy of the law is still followed in most cases. Hence such statutory changes as those

[1] And in the case of a contract for the sale of the fee simple or other freehold interest, if the vendor die before the conveyance is complete, the estate vests in his personal representative, although the vendor may not be a trustee in such a case. See C. A. 1881, § 4, *ante*, p. 213.

[2] See *post*, p. 266.

[3] Although a freehold trust estate now passes to the personal representative, it is still necessary to convey it to the trustees "and their *heirs*" or "in fee simple" in order to give them the fee simple.

[4] *Ante*, pp. 222 and 252.

[5] *Ante*, p. 238.

[6] *Ante*, p. 235.

[7] The Settled Land Act, 1882, § 53, *ante*, p. 220.

introduced by the Fines and Recoveries Act and the Wills Act, and the Real Property Act, 1845, affect equitable in the same way as legal estates. And in several instances the legislature has assimilated the law as to equitable estates to that as to legal estates where formerly there was a difference. Thus in earlier periods an equitable interest in freeholds was exempt from dower, but this anomaly was removed by the Dower Act, 1833[1]. Formerly, too, the estate of cestui que trust was not subject to escheat, but this was altered by the Intestates Estates Act, 1884, and the doubts[2] as to whether such an estate was or was not forfeitable on attainder of high treason were removed by the Forfeiture Act, 1870[3]. Some complications as to the law of assets were got rid of by Stat. 3 & 4 Will. IV. c. 104, which laid it down clearly that the whole of a person's estate or interest should be assets for the payment of debts. Before the present period, although the earlier statutes of limitation did not apply directly to equitable estates, yet the analogy of the law on the subject of limitations was followed. This practice was made statutory by Stat. 3 & 4 Will. IV. c. 27[4]. However, except in the case of money charged upon land, the application of the statute was confined to equitable interests arising by operation of law. It did not apply to a cestui que trust in an action against his trustee, and the act for the fusion of law and equity declared that

"no claim of a cestui que trust against his trustee for any property held upon an *express* trust, or in respect of any

[1] *Ante*, p. 201.

[2] See *ante*, p. 183.

[3] See *ante*, p. 246. It has also been settled, after some conflict, that the husband should have curtesy of the wife's *separate* equitable estate in fee, if she has not disposed thereof in her lifetime or by will. See *Cooper v. Macdonald*, 7 Ch. D. 288.

[4] *Ante*, p. 192. It should be noted that in cases where there is no limitation of actions imposed by statute, the Court will sometimes presume something to have been done which would be a bar to the action. The period after which this presumption will be raised depends on the circumstances of the case, and as a rule relief will not be granted where it would lead to great inconvenience,

breach of such trust, shall be held to be barred by any statute of limitations[1]."

A change was introduced after 1889 by the Trustee Act, 1888[2], which gives the defendant the same benefit of any statute of limitations as if he had not been a trustee, or person claiming through a trustee, unless the plaintiff can prove either (*a*) fraud or fraudulent breach of trust or (*b*) that, at the time when the action is brought, the trust estate is still retained by the trustee, or that he still has the proceeds of its sale, or (*c*) that, before the action, the property was received by the trustee and converted to his use.

Copyholds.

If the subject of the trust is a copyhold there is some modification of the above rules[3]. Thus § 5 of the Vendor and Purchaser Act, 1874, which made the estate of a bare trustee vest in his personal representative, applied only to trustees "seised in fee simple" and so excluded copyholders and customary freeholders. These, however, were included in § 30 of the Conveyancing Act, 1881, so that on the death of the trustee a copyhold devolved, notwithstanding any will, on the personal representative. But this, again, was altered by the Copyhold Act, 1887[4], which expressly excluded copyhold and customary land from the operation of § 30 of the Conveyancing Act, 1881. Thus once more a trust estate may be devised, and, in case of intestacy, it devolves on the customary heir, and this has not been affected by the Land Transfer Act, 1897, for that does not apply to copyholds[5]. Another difference in the law of trusts relating to copyholds and freeholds respectively is that the provisions of the Trustee Act, 1893[6], for the vesting of trust property in new trustees, do not apply to a legal estate in copyhold or customary land[7].

[1] Stat. 36 and 37 Vict. c. 66 (Judicature Act, 1873), § 25 (2).
[2] Stat. 51 and 52 Vict. c. 59, § 8. [3] See *ante*, p. 187.
[4] Repealed, but this clause re-enacted, by the Copyhold Act, 1894.
[5] § 1 (4). See *ante*, p. 223. [6] *Ante*, p. 262.
[7] See § 12 (3) of the Act.

As to the equitable estate, an equitable tenant in tail may bar the entail either by surrender or by deed, and where a deed is employed the same formalities as to inrolment etc. must be observed as when dealing with a legal estate[1]. It was observed[2] that in the preceding period there were some anomalies in the law of wills dealing with equitable estates in copyholds. These have been removed by the Wills Act, 1837, which makes the requirements of a valid will uniform in all such cases. The same act also removed the difficulty[3] as to the doctrine of resulting trusts where estates pur autre vie were involved. It was enacted that where there is no special occupant, an estate pur autre vie, whether in freehold or copyhold, shall, if not disposed of by the will of the grantee, go to his personal representative. It should be noted that the rule that trusts of copyholds were not assets by descent was altered by 3 & 4 Will. IV. c. 104, and finally that, as the Dower Act, 1833, does not apply to copyholds, an equitable interest is, as before, saved from the incidence of freebench.

Status.

The most important modifications of the rules of equity due to status must now be considered. The sovereign may grant his private property in trust for another, but this must be done by letters patent and the trust must appear upon the face of the letters patent and cannot be proved by parol evidence. The sovereign may be a trustee, that is he may take and execute a trust; but it is doubtful whether a subject can enforce the performance of the trust by ordinary legal process[4]. A trustee of the private estates of the sovereign was expressly declared[5] to be within the provisions of the Trustee

[1] See Fines and Recoveries Act, §§ 1, 42, 46, 50, 53, and *Green v. Paterson*, 32 Ch. D. C. A. 95.

[2] *Ante*, p. 187. [3] Ibid.

[4] See *Kinlock v. Sec. of State for India*, 15 Ch. D. C. A. 1; *Rustomjee v. The Queen*, 2 Q.B.D. C. A. 69. Of course the subject may proceed by petition of right.

[5] 25 and 26 Vict. c. 37, § 10.

Act, 1850[1]. The powers of an infant to make a settlement have already been discussed[2], and as an infant is not suited to act as a trustee the Court will remove him if appointed. Under the Trustee Act, 1893[3], the Court may make an order for the vesting in any person of land held by an infant upon trust, and by a vesting order the estate of an infant tenant in tail may be barred[4]; and, under the Fines and Recoveries Act, where an infant is protector of a settlement and not owner of a prior estate under the settlement, his place as protector is taken by the Chancery Division of the High Court[5]. Provision has also been made by the Conveyancing Act, 1881, and the Settled Land Acts, for the management of the estate when cestui que trust is an infant[6]. A lunatic is, of course, unfit to act as trustee, and the Lunacy Act, 1890, contains provisions for the vesting of the trust estate of a lunatic in new trustees by order of the judge in lunacy[7]. The equitable estate of a lunatic is, like his legal estate[8], managed either by the committee of the estate of the lunatic or by some person specially appointed by the judge.

Lunatics.

Under the old law of uses, a corporation 'having no soul' could not be seised to a use; but there is no such doctrine as to modern trusts. However, a corporation cannot acquire an equitable estate unless the conditions imposed by the Mortmain and Charitable Uses Act, 1888[9], are fulfilled. Formerly, if a married woman were a trustee of land, the legal estate vested in her husband, although in equity he was merely a trustee and could be compelled

Corporations.

Married Women.

[1] The greater part of this was repealed and replaced by the Trustee Act, 1893.

[2] *Ante*, p. 240. It should be noted that before the Fines and Recoveries Act, if an infant levied a fine or recovery and made a declaration of trusts, he was bound by the declaration, unless on coming of age he reversed the fine or recovery.

[3] 56 and 57 Vict. c. 53, §§ 26, 28.

[4] See *Re Montagu, Faber v. Montagu* [1896], 1 Ch. 549.

[5] 3 and 4 Will. IV. c. 74, § 33.

[6] See *ante*, p. 221.

[7] 53 and 54 Vict. c. 5, §§ 135, 140, 141.

[8] See *ante*, p. 241.

[9] 51 and 52 Vict. c. 42. See *ante*, p. 242.

to execute the trust. A change was made by the Vendor and Purchaser Act, 1874, which enacted that

"when any freehold or copyhold hereditament shall be vested in a married woman as a *bare* trustee, she may convey or surrender the same as if she were a *feme sole*[1]."

Except the woman is a bare trustee this law does not help her, and thus an acknowledgment of deeds by the husband is necessary to their validity. The rule has not been extended by the Married Women's Property Act, 1882[2], so that it is still inconvenient to have a married woman as a trustee other than a bare trustee. As to the equitable estate of a married woman, the law is similar to that dealing with a legal estate. According to the earlier law, the husband acquired an equitable estate in lands held in trust for the wife, unless the property were limited to the separate use of the wife. The husband could, without the wife's consent, convey an estate for their joint lives, or, after the birth of issue, for his own life, and after the Fines and Recoveries Act the husband and wife conjointly could bar an equitable entail by deed enrolled in Chancery, in the same manner as with a legal estate[3]. If, however, the estate were held in trust for the wife's *separate use* then, as we have seen[4], equity enforced this trust and the married woman was free to dispose of her estate. But at the close of the last period many important questions connected with this doctrine were not yet finally settled. Thus supposing lands were settled on a feme sole for her separate use in case of marriage, what were the rights of the husband if the woman failed

[1] 37 and 38 Vict. c. 78, § 6, replaced by § 16 of Trustee Act, 1893 [56 and 57 Vict. c. 53, § 16].

[2] *Re Harkness* [1896], 2 Ch. 358; see, however, *Re Brooke* [1898], 1 Ch. 647.

[3] The Fines and Recoveries Act [§ 90] enabled a married woman to dispose of her equitable estate in copyholds in the same way as with legal estates.

[4] *Ante*, p. 186.

to exercise her power of alienation before marriage and how was the problem affected if there was a restraint on anticipation? After much conflict of opinion[1] it was finally settled[2], in 1838, that the separate use (with the accompanying restraint on anticipation, if any) would revive at the marriage. And the exact extent of the wife's powers of disposition of a freehold estate settled to her separate use was not settled[3] till 1864, when it was held[4]

"that where real estate is vested in trustees upon trust for the separate use of a married woman (without a restraint on anticipation[5]) she has, as incident to her separate use, and without any express power being conferred on her, a complete right of alienation, either by instrument inter vivos, not acknowledged under the Fines and Recoveries Act, or by will[6], and that there is no distinction in this respect between an equitable fee and any other property[7]."

Originally a trust for the separate use of a married woman could be created only by act of parties. This was altered by the Married Women's Property Act, 1870[8], which settled for the wife's separate use the rents and profits of any realty that descended upon her, after the passing of the act, as heiress or co-heiress of an intestate. The great step, however, was taken by the Married Women's Property Act, 1882, by virtue of which the whole interest in the real estate given to a married woman belongs to her as her separate estate, and she can

[1] See *Massey v. Parker*, 2 Mylne and Keen, 174, and *Davies v. Thornycroft*, 6 Simons, 420.

[2] *Tuller v. Armstrong*, 1 Beavan, 1.

[3] See *Adams v. Gamble*, 12 Irish Ch. Rep. 102; *Leachmere v. Brotheridge*, 32 Beavan, 353; *Hoare v. Osborne*, 33 Law Journal (W. S.), Ch. 586.

[4] *Taylor v. Meads*, 5 New Reports, 348, extended in *Hall v. Waterhouse* [1865], 5 Giff. 64, to the case where there are no trustees for the wife's separate estate.

[5] The C. A. 1881, § 39, enabled the Court to set aside a restraint on anticipation, for the benefit of the wife.

[6] See *Cooper v. Macdonald*, 7 Ch. D. 288.

[7] Haynes, *Outlines of Equity*, Lecture VII.

[8] 33 and 34 Vict. c. 93, § 8.

dispose of it accordingly as a feme sole. The exception from the operation of this act contained in § 19 should be noticed. This section leaves a settlor free to impose restrictions on the interest given to a married woman, but apparently it means merely that the *construction* of the settlement is not to be affected, and that the act is not to apply except where the wife is bound by the settlement or has assented thereto[1].

Felons.

The changes in the law of forfeiture for felony have been noted already. In earlier periods if a trustee was attainted or convicted he forfeited his lands, and as the lord or the Crown, to whom they reverted, was not bound by the trust the cestui que trust lost everything. This state of affairs was altered at the close of the fourth period[2], and a few years later an amending act[3] was passed which provided that, on the attainder or conviction of any trustee, the land should not be forfeited, but should remain in the felon or survive to his co-trustee or devolve upon his representatives as if no such attainder or conviction had taken place. The act did not prevent the forfeiture of the equitable estate of a felon, but this was effected by the Forfeiture Act, 1870, which abolished forfeiture of equitable as well as of legal estates[4]. The Forfeiture Act did not deal with a trust estate, which remains vested in the trustee in spite of his conviction, although the court may appoint a new trustee[5].

Aliens.

The Naturalization Act, 1870, places aliens on the same footing as natural born British subjects.

Unlawful Trusts.

In addition to the restrictions on the creation of trust estates that have been considered in the discussion of status, there are some trusts that will not be enforced as

[1] *Ante*, p. 222; and *Re Lumley* [1896], 2 Ch. D. 690; *Re Queade's Trust*, W. N. [1884], 225; but see *Stevens v. Trevor-Garrick* [1893], 2 Ch. 307.

[2] *Ante*, p. 186.

[3] Stat. 4 and 5 Will. IV. c. 23.

[4] See *ante*, p. 246.

[5] See Trustee Act, 1893, 56 and 57 Vict. c. 53, §§ 25, 48, replacing earlier enactments to the same effect.

being against the policy of the law. Thus property cannot be settled on illegitimate children to be thereafter born. Trusts for "superstitious" uses, as for the purpose of saying masses or requiems for the souls of the dead, are void, and so are trusts "adverse to the foundation of all religion and subversive of all morality[1]." Restraints on alienation are, as a rule, distasteful to the law, and so the rule against perpetuities applies to trusts. Nor can a trust be created with a proviso that cestui que trust shall not alienate his interest, although an estate may be settled upon him *until* alienation.

[1] See Lewin [10th edit.], p. 113, and cases there cited.

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